

NO. _____

STATE OF TEXAS,	§	THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
METROPLEX QUARRY'S INC.,	§	
Defendant.	§	_____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION,
APPLICATIONS FOR TEMPORARY INJUNCTION AND PERMANENT
INJUNCTION, AND REQUEST FOR DISCLOSURE

TO THE HONORABLE JUDGE OF SAID COURT:

The State of Texas, by and through its Attorney General, Greg Abbott, on behalf of the people of Texas and the Texas Commission on Environmental Quality (TCEQ), files this Plaintiff's Original Petition, Applications for Temporary Injunction and Permanent Injunction, and Request for Disclosure, and for cause of action would show the following:

1. DISCOVERY CONTROL PLAN

1.1 Pursuant to TEX. R. CIV. P. 190, Plaintiff intends that discovery in this case be conducted under Level 2.

2. PARTIES AND SERVICE

2.1 Plaintiff, State of Texas, is authorized to bring this suit through its Attorney General at the request of the TCEQ. TEX. WATER CODE § 7.105(a).

2.2 Defendant Metroplex Quarry's Inc. ("Metro") is a Texas domestic corporation and may be served with process by serving its registered agent, Bart Barnett, at 11016 S. Pipeline Road, Euless, Texas 76040, or wherever he may be found.

3. JURISDICTION AND VENUE

- 3.1 This Court has jurisdiction over this suit. TEX. WATER CODE §§ 7.002 & 7.105(a).
- 3.2 Venue is proper in Travis County. TEX. WATER CODE § 7.105(c).

4. AUTHORITY

4.1 This suit seeks to enjoin certain unlawful acts of the Defendant and seeks the assessment of civil penalties, attorney's fees, and court costs. TEX. WATER CODE §§ 7.032, 7.102, & 7.108.

4.2 When it appears that "a violation or threat of violation of a statute . . . has occurred or is about to occur" the State may bring suit in district court for "injunctive relief to restrain the violation or the threat of violation." TEX. WATER CODE § 7.032.

4.3 No filing fee or other security for costs is required of the State. TEX. CIV. PRAC. & REM. CODE § 6.001.

4.4 "A person may not cause, suffer, allow, or permit a violation of a statute within the [TCEQ's] jurisdiction or a rule adopted or an order or permit issued under such a statute." TEX. WATER CODE § 7.101

4.5 The State is entitled to a civil penalty of not less than \$50 nor greater than \$25,000 for each day of each violation by any person who causes, suffers, or allows a violation of a statute, rule, order, or permit within the TCEQ's jurisdiction. TEX. WATER CODE § 7.102.

4.6 TEX. WATER CODE § 26.121(a) contains the following prohibition:

Except as authorized by the [TCEQ], no person may:

(1) discharge . . . industrial waste into or adjacent to any water in the state;

(2) discharge other waste into or adjacent to any water in the state which in itself or in conjunction with any other discharge or activity causes, continues to cause,

or will cause pollution of any of the water in the state, unless the discharge complies with a person's . . . water pollution and abatement plan approved by the [TCEQ]; or

(3) commit any other act or engage in any other activity which in itself or in conjunction with any other discharge or activity causes, continues to cause, or will cause pollution of any of the water in the state

4.7 Facilities with a Standard Industrial Classification (SIC) beginning with 10 through 14, must have a permit to discharge storm water to waters in the State. 30 TEX. ADMIN. CODE § 281.25(a)(4) (adopting by reference 40 C.F.R. § 122.26). In turn, 40 C.F.R. § 122.26(a)(1) requires a permit for a discharge of storm water associated with industrial activity.

4.8 Acceptance of a permit by the permittee “constitutes an acknowledgment and agreement that such person will comply with all terms and conditions embodied in the permit, and the rules and other orders of the [TCEQ].” 30 TEX. ADMIN. CODE § 305.124.

4.9 A permittee has the “duty to comply with all permit conditions. Failure to comply with any permit condition is a violation of the permit and statutes under which it was issued and is grounds for enforcement action. . . .” 30 TEX. ADMIN. CODE § 305.125(1).

4.10 The TCEQ issued Texas Pollutant Discharge Elimination System (“TPDES”) General Permit No. TXR050000 on August 20, 2001 (“General Permit”). This permit sets forth detailed requirements, prohibitions, and conditions for the discharge of storm water associated with industrial activity. The General Permit authorizes discharges only according to notice requirements, effluent limitations, monitoring requirements, and other conditions set forth in the permit. In pertinent part, the General Permit provides as follows:

4.10.1 “Storm water discharges associated with industrial activity that combine with sources of non-storm water are not eligible for coverage by this general permit,

unless either the non-storm water source is described in Part II.A.5 of [the General Permit] or the non-storm water source is authorized under a separate TPDES permit.” General Permit II.B.5, p. 12.

4.10.2 “Discharges that would cause or contribute to a violation of water quality standards or that would fail to protect and maintain existing designated uses of receiving waters are not eligible for coverage under this general permit.” General Permit II.B.6, p. 12.

4.10.3 To obtain authorization to discharge under the General Permit, a facility must submit a completed Notice of Intent (“NOI”) to the TCEQ requesting coverage. General Permit II.C.2, p. 14. Before submitting a NOI, the facility must develop a Storm Water Pollution Prevention Plan (“SWPPP”). A SWPPP must contain the following minimum requirements:

A storm water pollution prevention plan (SWP3) must be developed and implemented before submitting [a Notice of Intent] for coverage under this general permit. The SWP3 must be maintained onsite or made readily available for review by authorized TCEQ personnel upon request. . . . The SWP3 shall be developed according to the requirements of this general permit to:

- (1) identify actual and potential sources of pollution that may reasonably be expected to affect the quality of storm water discharges from the facility;
- (2) establish practices and any necessary controls that will prevent or effectively reduce pollution in storm water discharges from the facility and that ensure compliance with the terms and conditions of this general permit;
- (3) describe how the selected practices and controls are appropriate for the facility and how each will effectively prevent or lessen pollution;
- (4) discuss how controls and practices relate to each other such that together they comprise an integrated, facility-wide approach for pollution prevention in storm

water discharges. The discussion may include references to literature or site-specific performance information on the selected controls and practices to demonstrate the appropriateness of each.

General Permit II.C.3, p. 15; III.A, p. 18.

4.10.4 The SWPPP must also include other detailed requirements set out in the General Permit. These include a description of potential pollutants and sources with an inventory of exposed materials (General Permit III.A.4.(a), p. 20), a narrative description of all activities and potential sources of pollution that may reasonably be expected to add pollutants to storm water discharges (General Permit III.A.4.(b), pp. 20 - 21), a site map with the location of each outfall and other features (General Permit III.A.4.(c), p. 22), and a description of pollution prevention measures and controls including a maintenance program, periodic monitoring, and record keeping (General Permit III.A.5, pp 23 - 26)

4.10.5 The SWPPP must contain a section that sets out the Best Management Practices (“BMP”) “to reduce the discharge and potential discharge of pollutants in storm water.” General Permit III.A.5.(e), p. 25.

4.10.6 The General Permit incorporates the provisions of 30 TEX. ADMIN. CODE §§ 305.121 - .129. General Permit III. E, pp. 35 - 36. “Submission of an NOI for permit coverage is an acknowledgment that the applicant agrees to comply with the conditions of the general permit. Acceptance of authorization under the provisions of this general permit constitutes acknowledgment and agreement that the permittee will comply with all terms and conditions embodied in the permit, and the rules and other orders of the [TCEQ].” General Permit III.E.1.(a).(1), p. 36. “The permittee has a duty to comply with all conditions of the permit. Failure to comply with any permit condition constitutes a violation of the permit and the

Texas Water Code or the Texas Health and Safety Code, and is grounds for enforcement action” General Permit III.E.1.(a).(2), p. 36.

4.10.7 “The permittee shall take all reasonable steps to minimize or prevent any discharge or other permit violation which has a reasonable likelihood of adversely affecting human health or the environment.” General Permit III.E.2.(b), p. 38.

4.11 The Sector J of the General Permit governs storm water discharges for SIC codes beginning with the number 14.

4.12 A permittee has provisional authorization to discharge under the General Permit 48 hours after the post-mark date on its NOI submission to the TCEQ. General Permit II.C.2, p. 14.

5. BACKGROUND

5.1 Defendant Metro operates a dimension stone quarry at 1405 Hess Road, Mineral Wells, Palo Pinto County, Texas 76067 (“Facility”). Metro’s operations at the Facility are classified under SIC code 1411. The Facility is adjacent to Baker Creek which flows into the Brazos River, segment 1206. An unnamed tributary of Baker Creek flows through the Facility. The Facility is approximately 0.94 miles upstream on Baker Creek from the Brazos River.¹

5.2 Defendant operated the Facility for at least 4 years prior to the inspection.

5.3 On January 29, 2004, Defendant submitted an NOI for TPDES General Permit No. TXR050000. By operation of law, Defendant was authorized to act under the General

¹The Facility adjoins Baker Creek as the creek makes a 180^N turn. Accordingly, the Facility fronts approximately 1 mile of Baker Creek, 0.94 miles upstream of the Brazos River to about 2 miles upstream of the Brazos River.

Permit on and from January 31, 2004. Prior to January 31, the Defendant did not have any permit for storm water or non-storm water discharges from the Facility.

5.4 The TCEQ assigned permit number TXR05R238 to the Facility.

5.5 TCEQ inspected the Facility on May 3, 2004, and May 11, 2004. The inspector identified the following:

5.5.1 Defendant discharged storm water to an unnamed tributary of Baker Creek. The tributary runs through a portion of the Facility and joins Baker Creek approximately 0.96 miles upstream from where Baker Creek joins the Brazos River. Defendant maintained stockpiles of excavated materials at the Facility. The piles had erosion rills on their slopes. Material from the piles was observed in the unnamed tributary of Baker Creek along its length. Any water in the unnamed tributary would flow into Baker Creek.

5.5.2 Defendant discharged rock, sand, gravel, soil, fines, aggregate, and other similar material from the Facility into and adjacent to Baker Creek. Mounds of the mined material were piled immediately adjacent to Baker Creek along the tops of hills or bluffs that line the creek or had actually been placed in Baker Creek and its bed. In many areas, there are no effective barriers between the piles of materials and Baker Creek that mitigate either (1) the deposition of materials from the piles into Baker Creek or (2) the run-off of storm water from the piles into Baker Creek. Defendant stated that material had been dumped into or adjacent to Baker Creek for approximately 4 years before the inspection. From time to time, Defendant added materials to the piles. Baker Creek flows through a portion of the piles of materials. Storm water from the materials flows directly into Baker Creek. Baker Creek is affected downstream from the piles of materials.

5.5.3 Defendant's SWPPP identified the following as the applicable Best Management Practices or BMPs for Overburden, Waste Rock, and Raw Materials Piles at the Facility:

- ! Dikes, Curbs, Berms.
- ! Channels, Gutters Serrated Slopes, Benched Slopes, Contouring, Stream Alteration².
- ! Plastic Matting, Plastic Netting, Erosion Control Blankets, Mulch-straw, Compaction, Sediment/Settling Ponds, Silt Fences, Siltation Berms.
- ! Topsoiling, Seedbed Preparation, Seeding.
- ! Capping.

In fact, Defendant claimed that the materials that it had discharged into or adjacent to Baker Creek performed as a storm water control filter. Defendant also claimed to have installed rock check dams in Baker Creek. Neither the "filter" nor rock check dams are listed as BMPs in the SWPPP. Moreover, the inspector could not locate rock check dams either on the site map or during the inspection of Baker Creek. The inspector noted a vegetative buffer between the southern perimeter of the Facility and Baker Creek. However, some areas lacked sufficient vegetation to control erosion and sediment discharge. The inspector identified erosion rills to Baker Creek.

5.5.4 Although Defendant lists BMPs in its SWPPP, Defendant has not installed any of the listed BMPs, with the exception of a short, isolated silt fence that appeared to be ineffective. The BMPs Defendant claims to have installed are not set out in the SWPPP

²Generally, stream alteration is not an acceptable BMP to mitigate storm water outfalls. The purpose of BMPs is to mitigate the effect of pollution from storm water *before* the storm water reaches a water in the State.

and are not effective to mitigate storm water discharges of pollutants into Baker Creek. Baker Creek contains sediments that had eroded and washed off the Facility.

5.5.5 The Defendant's SWPPP did not comply with the requirements of the General Permit. Defendant did not include aggregate, soil, and fines as material handled, treated, stored, or disposed of in a manner that is exposed to storm water. Defendant also failed to list in its narrative descriptions maintenance and fueling activities.

5.5.6 Defendant samples the water at a single location in Baker Creek. The selected sample location is not representative of the storm water discharges from the Facility to Baker Creek. The selected sample location does not reflect the discharges Defendant makes through the rock pile in Baker Creek, nor does it reflect discharges from the unnamed tributary of Baker Creek that runs through the Facility.

6. CLAIM 1: CIVIL PENALTIES FOR UNAUTHORIZED DISCHARGE OF STORM WATER

6.1 In violation of TEXAS WATER CODE §§ 7.101 & 26.121(a), 30 TEX. ADMIN. CODE §§ 281.25(a)(4) & 305.125(1), and the General Permit, Defendant discharged storm water in or adjacent to waters in the State. Defendant discharged storm water that caused or will cause a condition of pollution to waters in the State. Defendant also discharged storm water without BMPs installed and/or properly maintained. Each day on which Defendant has discharged storm water from the Facility is a separate violation for which it is liable for a civil penalty within the range permitted by law.

7. CLAIM 2: CIVIL PENALTIES FOR UNAUTHORIZED DISCHARGE OF POLLUTANTS

7.1 In violation of TEXAS WATER CODE §§ 7.101 & 26.121(a), Defendant discharged rock, sand, gravel, soil, fines, aggregate, and other similar material in or adjacent to waters in the State. The discharge caused or will cause a condition of pollution of the waters in the State.³ Defendant has not removed the material discharged in or adjacent to waters in the State. Each day on which materials discharged by Defendant remain in or adjacent to the waters in the State is a separate violation for which it is liable for a civil penalty within the range permitted by law.

8. CLAIM 3: CIVIL PENALTIES FOR VIOLATION OF THE GENERAL PERMIT

8.1 In violation of the TEXAS WATER CODE § 7.101, 30 TEX. ADMIN. CODE §§ 281.25(a)(4) & 305.125(1), and the General Permit, Defendant failed to comply with the provisions of the General Permit. Defendant did not implement the BMPs set out in its SWPPP, did not include all activities in which it is engaged at the Facility in its narrative in the SWPPP, and did not list all materials at the Facility in the list of materials in the SWPPP. Each failure is a separate violation that continues from day-to-day from the date of first violation until the violation is remedied. The date of first violation is on or about the date the General Permit became effective on a provisional basis for Defendant, on or about January 31, 2004. Defendant is liable for a civil penalty within the range permitted by law for each day of each continuing violation.

³The State reserves the right to allege violations of the Texas Solid Waste Disposal Act and related regulations.

9. INJUNCTIVE RELIEF

9.1 Defendant has caused the discharge of wastes and pollutants into the waters in the State without authorization from the TCEQ. Defendant continues to operate the Facility without installing and maintaining adequate BMPs to mitigate storm water discharges from the Facility. Defendant also continues to maintain a pile of pollutants or potential pollutants in or adjacent to Baker Creek.

9.2 Defendant threatens to continue to violate TEXAS WATER CODE §§ 7.101 & 26.121, 30 TEX. ADMIN. CODE §§ 281.25(a)(4) & 305.125(1), and the General Permit unless restrained by the Court.

9.3 Pursuant to TEXAS WATER CODE § 7.032, the State requests that this Court issue a temporary injunction against Defendant Metroplex Quarry's, Inc., and its officers, agents, and employees, and those in actual concert or participation with them as follows:

9.3.1 Defendant shall not add any further materials to any surface stack, pile, mound, or storage areas for rock, sand, gravel, soil, fines, aggregate, and other similar material in Baker Creek or adjacent to the banks or bed thereof. Defendant shall start the immediate removal of all such materials within Baker Creek, or in and along the banks of Baker Creek, to a sufficient distance from Baker Creek so that appropriate BMPs may be installed to mitigate further pollution of Baker Creek.

9.3.2 Defendant shall design and install BMPs to mitigate discharges of pollutants to waters in the State from the storm water outfalls identified in this petition and from the pile of materials at the Facility that are in and along Baker Creek.

9.4 The State requests that, after trial on the merits, the Court issue such permanent injunctive relief as is warranted by the facts of the case established at that time.

10. ATTORNEY'S FEES AND COSTS

10.1 The State requests recovery of its attorney's fees and court costs expended in the prosecution of this case from Defendant as authorized by TEXAS WATER CODE § 7.108 & TEX. GOVT. CODE § 402.006(c).

11. REQUEST FOR DISCLOSURE

11.1 Pursuant to TEX. R. CIV. P. 194, Defendant is requested to disclose to the Plaintiff, within 50 days of service of this request, the information or material described in Rule 194.2 (a), (b), (c), (e), (f), & (i).

PRAYER

ACCORDINGLY, the State respectfully requests:

1. That Defendant be ordered to appear and answer herein;
2. That temporary and permanent injunctive relief be granted as requested in this petition;
3. That civil penalties be assessed as requested in this petition;
4. That the State recover its attorney's fees and court costs in this case; and
5. That the State be granted all other relief to which it is entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF
STATE OF TEXAS

AFFIDAVIT

THE STATE OF TEXAS §
§
§
COUNTY OF TRAVIS §

Before me, the undersigned notary, on this day personally appeared Deann Russey, a person whose identity is known to me. After I administered an oath to her, upon oath she said:

My name is DEANN RUSSEY, I am over the age of twenty-one years and of sound mind, capable of making this Affidavit, and personally acquainted with the facts herein:

I am employed by the Texas Commission on Environmental Quality as an Environmental Investigator in the Region 4 office of the Texas Commission on Environmental Quality.

I have read the foregoing Plaintiff's Original Petition, Applications for Temporary Injunction and Permanent Injunction, and Request for Disclosure and am familiar with the facts alleged. The facts alleged in paragraphs 5.1 through 5.5.6 of the Original Petition are within my personal knowledge and are true and correct.

DEANN RUSSEY

SUBSCRIBED AND SWORN TO BEFORE ME on _____,
2004, to certify which witness my hand and official seal.

Given under my hand and seal of office on _____.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS