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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 17, 2007

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

2007 AUG 17 PM 3:07
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**RE: ELMER JACK PARKS DBA JACK PARKS DAIRY
TCEQ DOCKET NO. 2007-1128-IWD**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Elmer Jack Park's Motion to Overturn the Executive Director's Position and Motion to Determine the Technical Sufficiency of Necessary Technical Data in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

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TCEQ DOCKET NO. 2007-1128-IWD

2007 AUG 17 PM 3: 07

IN THE MATTER OF
ELMER JACK PARKS
DBA JACK PARKS
DAIRY FOR
INDIVIDUAL PERMIT
NO. WQ0003590000 TO
OPERATE A
CONCENTRATED
ANIMAL FEEDING
OPERATION

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BEFORE THE CHIEF CLERK'S OFFICE
COMMISSION ON
ENVIRONMENTAL
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO ELMER
JACK PARKS' MOTION TO OVERTURN EXECUTIVE DIRECTOR'S
POSITION AND MOTION TO DETERMINE THE TECHNICAL SUFFICIENCY
OF NECESSARY TECHNICAL DATA**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas
Commission on Environmental Quality (the Commission or TCEQ) and files this
Response to Elmer Jack Parks' Motion to Overturn the Executive Director's Decision and
Motion to Determine the Sufficiency of Necessary Technical Data (motions).

I. PROCEDURAL BACKGROUND

Elmer Jack Parks (Applicant) is the longtime owner/operator of a dairy operating
as a concentrated animal feeding operation (CAFO). The Applicant submitted an
amended application on August 6, 2004 to amend his permit in response to the enactment
of more protective CAFO rules. The application was declared administratively complete
on September 21, 2004. Applicant attached multiple correspondences between TCEQ
staff and Applicant to his motions.¹ The attachments include an October 27, 2006 Notice

¹ See Elmer Jack Parks' Motion to Overturn the Executive Director's Decision and Motion to Determine
Technical Sufficiency, received July 13, 2007 in the Office of the Chief Clerk; Exhibits A-I.

of Deficiency (NOD) letter from L'Oreal Stepney requesting an "updated technically complete and accurate application" to be received by TCEQ within 30 days of the date of the letter.² She further states that if the Applicant does not comply, the ED will return the application, in accordance with 30 TEXAS ADMIN.CODE §281.19 (b).³ Applicant submitted additional information on November 27, 2006 and TCEQ staff quickly responded on December 4, 2006 in a letter which states the submission contained insufficient information.⁴ The ED attached a detailed list of deficiencies to this letter and stated that items in the attachment required a complete response by January 4, 2007.⁵ Applicant submitted additional information on January 4, 2007 and TCEQ again responded in a letter outlining the remaining "major deficiencies" on March 28, 2007.⁶ Although more information was submitted by Applicant on April 11, 2007, June 12, 2007 and June 14, 2004, no additional NODs were sent to Applicant and the ED returned the application by a letter dated June 20, 2007.⁷

II. ANALYSIS OF MOTIONS

The Applicant's motions rely upon 30 TEXAS ADMIN. CODE §281.19 (b), which states, in full (emphasis added):

Except as provided in subsection (c) of this section, the applicant shall be promptly notified of any additional technical material as may be necessary for a complete review. If the applicant provides the information within the period of time prescribed by subsection (a) of this section,

² *Id.* Exhibit D.

³ *Id.*

⁴ See Elmer Jack Parks' Motion to Overturn the Executive Director's Decision and Motion to Determine Technical Sufficiency; Exhibit E.

⁵ *Id.*

⁶ See Elmer Jack Parks' Motion to Overturn the Executive Director's Decision and Motion to Determine Technical Sufficiency; Exhibit F.

⁷ See Elmer Jack Parks' Motion to Overturn the Executive Director's Decision and Motion to Determine Technical Sufficiency; Exhibit I.

the executive director will complete processing of the application within the technical review period extended by the number of days required for the additional data. If the necessary additional information is not received by the executive director prior to expiration of the technical review period and the information is considered essential by the executive director to make recommendations to the commission on a particular matter, the executive director may return the application to the applicant. In no event, however, will the applicant have less than 30 days to provide the technical data before an application is returned. Decisions to return material to the applicant during the technical review stage will be made on a case by case basis. *The applicant has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision **instead of having the application returned.*** (emphasis added)

Applicant's motions claim that each application was returned on the basis of technical insufficiency, without proper notice that would allow the Applicant to request a Commission decision on sufficiency before the application was actually returned. OPIC agrees that this is the relevant section needed to analyze the Applicant's Motions.

It is clear that 30 TEXAS ADMIN. CODE §281.19 (b) intends to offer applicants an opportunity to have the Commission exercise final oversight over the ED's decision to return an application. It is not clear, however, how such a referral of the "question of sufficiency of necessary technical data" should be accomplished by an applicant. In this instance, Applicant's motions state that Applicant was denied its opportunity to have the sufficiency of necessary technical data determined by the Commission instead of having the application returned. OPIC agrees. However, OPIC also finds that by hearing and ruling on the Applicant's motions, the Commission can essentially provide the relief required by the Texas Administrative Code and requested by Applicant.⁸ Therefore,

⁸ OPIC notes that this does not resolve the interim issue of Applicant likely having reduced his herd size from about 700 to under 200 in order to avoid potential enforcement actions. The ED states that Applicant

OPIC first recommends that the Commission assert jurisdiction to simultaneously consider applicant's Motion to Overturn the Executive Director's Decision and Motion to Determine the Sufficiency of Necessary Technical Data.

Applicant "requests that the Commissioners of the TCEQ overturn the Executive Director's Decision and reinstate the application for further consideration and approval by the TCEQ."⁹ Applicant also requests the Commission "stay the Executive Director's decision to return the application and reinstate" applicant's CAFO permit until a final determination is made in response to this motion to overturn.¹⁰ OPIC recommends hearing and ruling on applicant's motions, which effectively first grants Applicant's Motion to Determine the Sufficiency of Necessary Technical Data. However, OPIC cannot support the relief requested by Applicant.

The ED continued to warn Applicant that his submittals were insufficient. Nevertheless, the ED continued the technical review process after each submittal, until he finally returned the application. Based upon Applicant's filing and attached exhibits, OPIC has not been presented a reason to question the ED's determination that he still needed more information to complete technical review. The multiple NODs demonstrate a continued frustration with Applicant's responses to the ED's requests for more information. Based upon the information available, OPIC recommends the Commission

no longer has "a valid...authorization to operate a CAFO since [applicant] do[es] not have a pending renewal application." See Exhibit I, Page 2. OPIC is not briefing on the potentially recurring enforcement issue which results from applicants utilizing the MTO process as the procedural mechanism to request Commission review of the technical sufficiency question on an application *already returned*.

⁹ Elmer Jack Parks' Motion to Overturn the Executive Director's Decision and Motion to Determine Technical Sufficiency. Pages 1-2

¹⁰ *Id.* at Page 5. OPIC notes the conundrum faced by this applicant: Only the Executive Director knows the exact date when he will return the application. There are no rules that an applicant can rely upon to know how and when to exercise the procedural right to have the Commission address the issue of the Sufficiency of Necessary Technical Data before the application returned.

answer the question of sufficiency of necessary technical data by agreeing with the ED's determination that Applicant failed to provide the information necessary to complete technical review. In answering this question in favor of the ED's position, the Commission may then deny Applicant's motion to overturn the ED's decision to return the application.

III. CONCLUSION

For the reasons stated above, OPIC respectfully requests that the Commission assert jurisdiction to hear the two motions. OPIC also recommends the Commission grant Applicant's motion to Determine the Sufficiency of Necessary Technical Data, and deny Applicant's Motion to Overturn.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By Christina Mann
Christina Mann
Assistant Public Interest Counsel
State Bar No. 24041388
(512)239.6363 PHONE
(512)239.6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2007 the original and eleven true and correct copies of the Office of the Public Interest Counsel's Response to Elmer Jack Parks' Motion to Overturn the Executive Director's Decision and Motion to Determine the Sufficiency of Necessary Technical Data were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail

Christina Mann
Christina Mann

Mailing List
Elmer Jack Parks dba Jack Parks Dairy
TCEQ Docket No. 2007-1128-IWD

James Bradbury
Jackson Walker, LLP
301 Commerce St., Suite 2400
Fort Worth, Texas 76102
817/334-7200 FAX 817/334-7290

Bob Brush
TCEQ Environmental Law Division MC 173
P.O. Box 13087
Austin, Texas 78711-3087
512/239-0600 FAX 512/239-0606

L'Oreal Stepney
TCEQ Water Quality Division MC 148
P.O. Box 13087
Austin, Texas 78711-3087
512/239-4540 FAX 512/239-4114

Docket Clerk
TCEQ Office of Chief Clerk MC 105
P.O. Box 13087
Austin, Texas 78711-3087
512/239-3300 FAX 512/239-3311

Bridget Bohac
TCEQ Office of Public Assistance MC 108
P.O. Box 13087
Austin, Texas 78711-3087
512/239-4000 FAX 512/239-4007