

SOAH DOCKET NO. 582-08-0007
TCEQ DOCKET NO. 2007-0831-AGR

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 DEC 18 PM 3:21
CHIEF CLERK'S OFFICE

IN THE MATTER OF THE
APPLICATION OF HIDDEN VIEW
DAIRY FOR AMENDMENT TO TEXAS
POLLUTANT DISCHARGE
ELIMINATION SYSTEM (TPDES)
PERMIT No. WQ0003197000

§
§
§
§
§
§

BEFORE THE STATE OFFICE

OF

ADMINISTRATIVE HEARINGS

ORDER NO. 2
ORDER REGARDING PLEA TO THE JURISDICTION AND MOTIONS TO CERTIFY
QUESTIONS

On November 8, 2007, a preliminary hearing was held in this case, and jurisdiction was proven. Several issues were considered at the hearing including the designation of parties as set forth in the Order dated November 27, 2007. On December 7, 2007, Applicant filed a Plea to the Jurisdiction and an Alternative Motion to Certify Questions to the Commissioners. On December 14, 2007, Sierra Club filed its Reply and an Alternative Motion to Certify Questions to the Commissioners.

I. Plea to the Jurisdiction

The Interim Order of the Texas Commission on Environmental Quality (TCEQ) issued August 31, 2007, referring this case to the State Office of Administrative Hearings (SOAH) was in response to the request for hearing filed by the Lone Star Chapter of the Sierra Club (Sierra Club) based on a finding that Carol Robbins, a member of Sierra Club, was an adjacent landowner and affected person. The November 27, 2007 Order on Preliminary Hearing in this case found that Carol Robbins was not an affected person. Applicant argues that this finding has the effect of denying a timely filed hearing requests in this matter, thereby requiring that the case be remanded to TCEQ pursuant to 30 TEX. ADMIN. CODE (TAC) § 80.101.

SOAH DOCKET NO. 582-08-0007
TCEQ DOCKET NO. 2007-0831-AGR

ORDER NO. 2

PAGE 4

The finding that Carol Robbins was not an affected person is not a denial of the timely hearing request by Sierra Club. The hearing request was granted by TCEQ's Interim Order on August 31, 2007. SOAH has jurisdiction of this case pursuant to that Order. The fact that the basis for Sierra's Club's hearing request being granted no longer exists does not remove that jurisdiction inasmuch as Sierra Club was able to secure the membership of Pritchey Smith, who secured party designation at the preliminary hearing pursuant to 30 TAC § 80.109 as an affected person. There is no requirement that Pritchey Smith had to timely make a hearing request during the public comment period in order to request designation as a party at the Preliminary Hearing. Accordingly, Applicant's Plea to the Jurisdiction is denied.

II. Certification of Questions

In the alternative, Applicant has requested that two questions be certified to the Commission pursuant to 1 TAC § 155.36(b). Those questions are as follows:

1. When the Commission refers a case to SOAH solely based on a hearing request filed by an association, and the Commission indicates in its Interim Order that the referral to SOAH is based on a single named member, and thereafter SOAH determines that the named member is, in fact, not actually an "affected person," may that association then rely upon the interests of a newly solicited member (i.e., a person solicited to join the association only after the referral to SOAH) for purposes of conferring standing on the association?
2. May a person gain party status at a preliminary hearing in a contested case when the sole hearing request that gave rise to the preliminary hearing was determined not to be made by an affected person?

SOAH DOCKET NO. 582-08-0007
TCEQ DOCKET NO. 2007-0831-AGR

ORDER NO. 2

PAGE 3

Sierra Club has also requested the certification of the following question to the Commission:

Is the owner of a vested remainderman interest in property adjacent to a concentrated animal feeding operation an affected person with respect to an application for a new or amended individual permit for that facility?

A. Applicable Law

The rule at 30 TAC § 55.201 provides that an affected person may request a contested case hearing, which request must be filed with the TCEQ no later than 30 days after the Chief Clerk mails the Executive Director's decision and response to comments. To qualify as an affected person, a person must have "a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TAC § 55.203(a). 30 TAC § 55.205 provides that a group or association may request a contested case only if one or more members of the group or association would otherwise have standing to request a hearing, the interests the group or association seeks to protect are germane to the purposes of the group or association, and neither the claim asserted nor relief requested requires the participation of the individual members in the case. Once a contested case hearing is granted, the designation of parties is made at the Preliminary Hearing held by SOAH. 30 TAC § 80.109(a) provides that, to be admitted as a party, a person must have a justiciable interest in the matter being considered.

B. Discussion

CERTIFIED QUESTION NO. 1

Is the owner of a vested remainderman interest in property adjacent to a concentrated animal feeding operation an affected person with respect to an application for a new or amended individual permit for that facility?

SOAH DOCKET NO. 582-08-0007
TCEQ DOCKET NO. 2007-0831-AGR

ORDER NO. 2

PAGE 4

Although this question was answered by the Administrative Law Judge (ALJ) in the negative in the November 27, 2007 Order, because the initial referral for hearing was based on the status of Carol Robbins as an affected person, the question of the sufficiency of her justiciable interest as a remainderman should be considered by the Commission.

Carol Robbins' interest in land adjacent to Applicant's operation is that of a remainderman pursuant to her father's will. At the present time, her mother has the possessory life estate in the property. Ms. Robbins lives in Dallas and is an infrequent visitor to the property. Her mother has chosen not to participate in this proceeding. The opinion of the ALJ is that Carol Robbins' remainder interest is not sufficient for her to qualify as an affected person.

As noted by Sierra Club, the ALJ's interpretation is "determinative of the relevance of the questions posed for certification by the Applicant." If the Commission agrees with Sierra Club that Carol Robbins is an affected person, then the Applicant's questions are moot. If the Commission determines that Carol Robbins is not an affected person, then the Applicant's questions are germane to the proceeding.

CERTIFIED QUESTION NO. 2

(To be reached only if the answer to Question No. 1 above is "no.")

When the Commission refers a case to SOAH solely based on a hearing request filed by an association, and the Commission indicates in its Interim Order that the referral to SOAH is based on a single named member, and thereafter SOAH determines that the named member is, in fact, not actually an "affected person," may that association then rely upon the interests of a newly solicited member (i.e., a person solicited to join the association only after the referral to SOAH) for purposes of conferring standing on the association?

Applicant argues that the first question raises substantial policy considerations concerning associational standing within the context of TCEQ's rules. Applicant contends that this question

SOAH DOCKET NO. 582-08-0007
TCEQ DOCKET NO. 2007-0831-AGR

ORDER NO. 2

PAGE 5

“would allow the Commission to develop their policy regarding whether it is timely and permissible conduct for an association to manufacture ‘members’ after the issuance of an Interim Order referring a case to SOAH for purposes of producing an ‘affected person’ on whom the association may rely for establishing associational standing in protest.”

The referral to SOAH was based on the representation by Sierra Club that Carol Robbins was an affected person. After the referral was granted, Sierra Club asked Carol Robbins to recruit Pritchey Smith, an adjacent landowner, who signed up as a member of Sierra Club approximately a month before the Preliminary Hearing. Mr. Smith then requested, through his sons, to be designated as a party, and his status as an affected person and a member of Sierra Club rather than the membership of Carol Robbins was the basis for the designation of Sierra Club as a party.

Applicant argues that by allowing Sierra Club and Mr. Smith to be designated as parties effectively allowed them to file hearing requests at the Preliminary Hearing, which is not authorized by TCEQ rules. However, as noted by Sierra Club, there is nothing in the rules that states that a person requesting party status at the Preliminary Hearing has to have requested a hearing in the first place. As a result, there is nothing preventing Mr. Smith from being designated a party.

On the other hand, inasmuch as the reason for granting the initial hearing request to Sierra Club was subsequently determined by the ALJ to be invalid, *i.e.*, that Carol Robbins was not actually an “affected person,” does the Commission interpret its rules to mean that once a matter is referred to SOAH for hearing it cannot continue because the original basis for the referral no longer exists? Such an interpretation would mean that whenever there is a matter referred for hearing based on the request of only one person, should that person not qualify as a party then the hearing would necessarily be remanded to the Commission.

SOAH DOCKET NO. 582-08-0007
TCEQ DOCKET NO. 2007-0831-AGR

ORDER NO. 2

PAGE 6

CERTIFIED QUESTION NO. 3

(To be reached only if the answer to Question No. 1 above is "no.")

May a person gain party status at a preliminary hearing in a contested case when the sole hearing request that gave rise to the preliminary hearing was determined not to be made by an affected person?

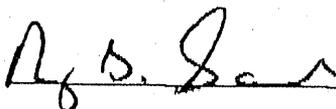
Applicant contends that the second question raises the issue as to whether the Commission policy should be clarified as to whether a person may only seek party status in a matter where an affected person had already properly filed a hearing request. Applicant argues that this question is important to the procedural and substantive requirements of TCEQ because "it recognizes the legally distinct requirements for 'seeking party status' and for 'filing a hearing request.'"

The basic issue raised by this question is whether the Commission interprets its rules to mean that if a group or association's hearing request was not timely based on the membership of an affected person, then SOAH never actually had jurisdiction despite the referral, and the subsequent designation of parties is without effect.

Based on Applicant's Motion and the Response thereto, the above-stated questions are hereby certified to the TCEQ pursuant to 1 TAC § 155.35(b).

The hearing on this matter is abated until such time as the TCEQ answers the certified questions.

SIGNED December 18, 2007.



ROY G. SCUDDAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE

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: HIDDEN VIEW DAIRY, A TEXAS GENERAL PARTNERSHIP
SOAH DOCKET NUMBER: 582-08-0007
REFERRING AGENCY CASE: 2007-0831-AGR

STATE OFFICE OF ADMINISTRATIVE HEARINGS

ADMINISTRATIVE LAW JUDGE

ALJ ROY SCUDDAY

REPRESENTATIVE / ADDRESS

PARTIES

ERIC ALLMON
 ATTORNEY
 LOWERRE & FREDERICK
 44 EAST AVENUE, SUITE 101
 AUSTIN, TX 78701
 (512) 469-6000 (PH)
 (512) 482-9346 (FAX)

PRITCHY SMITH

SIERRA CLUB - LONESTAR CHAPTER

GARRETT ARTHUR
 STAFF ATTORNEY
 TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
 OFFICE OF PUBLIC INTEREST COUNSEL
 MC-175 P.O. BOX 13087
 AUSTIN, TX 78711-3087
 (512) 239-5757 (PH)
 (512) 239-6377 (FAX)

OFFICE OF PUBLIC INTEREST COUNSEL

ROBERT D BRUSH
 STAFF ATTORNEY
 TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
 ENVIRONMENTAL LAW DIVISION
 PO BOX 13087
 AUSTIN, TX 78711
 (512) 239-5600 (PH)
 (512) 239-0606 (FAX)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

LEONARD H DOUGAL
ATTORNEY AT LAW
JACKSON WALKER, L.L.P.
100 CONGRESS AVENUE, SUITE 1100
AUSTIN, TX 78701
(512) 236-2000 (PH)
(512) 236-2002 (FAX)

HIDDEN VIEW DAIRY

cc: Docket Clerk, State Office of Administrative Hearings

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 502

Austin, Texas 78701

Phone: (512) 475-4993

Fax: (512) 475-4994

DATE:

12/18/2007

NUMBER OF PAGES INCLUDING THIS COVER SHEET:

9

REGARDING:

ORDER NO. 2 - ORDER REGARDING PLEA TO THE JURISDICTION AND MOTIONS TO CERTIFY QUESTIONS

DOCKET NUMBER:

582-08-0007

JUDGE ROY SCUDDAY

FAX TO:

LEONARD H DOUGAL

FAX TO:

(512) 236-2002

ERIC ALLMON

(512) 482-9346

GARRETT ARTHUR (TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)

(512) 239-6377

ROBERT D BRUSH (TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)

(512) 239-0606

KX & Associates

(214) 630-9200

Kennedy Court Reporting Services

(512) 474-6704

TCEQ Docket Clerk, Fax Number 512/239-3311

NOTE: IF ALL PAGES ARE NOT RECEIVED, PLEASE CONTACT SUSAN BRYSON(sbr) (512) 475-4993

The information contained in this facsimile message is privileged and confidential information intended only for the use of the above-named recipient(s) or the individual or agent responsible to deliver it to the intended recipient. You are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the address via the U.S. Postal Service. Thank you.

CHIEF CLERKS OFFICE

2007 DEC 18 PM 3:21

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY