

LOWERRE, FREDERICK, PERALES & ALLMON

ATTORNEYS AT LAW
44 East Avenue, Suite 100
Austin, Texas 78701
(512) 469-6000 • (512) 482-9346 (facsimile)
Mail@LF-LawFirm.com

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CHIEF CLERKS OFFICE

February 4, 2008

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

Via hand-delivery

**Re: Application by Hidden View Dairy for TPDES Permit No. WQ03197.
TCEQ Docket No. 2007-0831-AGR, SOAH Docket No. 582-08-0007**

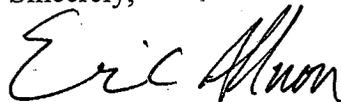
Dear Ms. Castañuela,

Please find enclosed for filing an original and eleven copies of the **Reply Brief of Sierra Club and Dr. Pritch Smith Regarding Certified Questions** in the above-referenced matter.

Also note that the name of the firm has now changed from Lowerre & Frederick to Lowerre, Frederick, Perales & Allmon. This does not alter the contact information for the firm.

If you have any questions please call.

Sincerely,



Eric Allmon

Enclosures

cc: Service List

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

IN THE MATTER OF THE	§	BEFORE THE TEXAS
APPLICATION OF HIDDEN VIEW	§	COMMISSION ON
DAIRY FOR TCEQ WATER QUALITY	§	ENVIRONMENTAL QUALITY
PERMIT NO. 03197	§	

REPLY BRIEF OF SIERRA CLUB AND DR. PRITCHY SMITH REGARDING
CERTIFIED QUESTIONS

TO THE HONORABLE COMMISSIONERS:

Come now the Sierra Club (the "Club") as well as Dr. Pritchly Smith, (collectively "Protestants") and file this, their Reply Brief Regarding Certified Questions. Protestants would respectfully show the following:

I. INTRODUCTION

The Administrative Law Judge ("ALJ") certified three questions to the Texas Commission on Environmental Quality ("TCEQ"):

- (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?
- (2) 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 purpose of conferring standing on the association?
- (3) 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?

TCEQ accepted these questions for consideration. The parties to the case recommended that the Commission answer these questions as follows:

Party	Question 1	Question 2	Question 3
Protestants	Yes	Yes	Yes
OPIC	Yes	Yes	Yes
Executive Director	No	Yes	Yes
Applicant	No	No	No

As this chart indicates, both OPIC and the ED were in agreement with Protestant on questions of procedure at the preliminary hearing. This is no accident. The parties with the most experience in the House Bill 801 process are all in agreement on questions 2 & 3 because the answers to these questions are clear under the statutory and regulatory framework and Commission precedent. Only question One presents a question of first impression requiring clarification by TCEQ, which explains the divergence of OPIC and the Executive Director on this question.

II. FIRST QUESTION CERTIFIED BY ALJ

A. The Question

The administrative law judge (“ALJ”) first recommends certification of the question requested by Protestants:

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?

B. Response to OPIC

Protestants agree with OPIC that the owner of a vested remainderman interest in property adjacent to a confined animal feeding operation is an affected person. A vested remainderman interest is a property *right*, which constitutes a justiciable interest.

C. Response to Applicant, Amici, and ED

In addition to responses filed by ED and Applicant, an amicus brief was filed by various agricultural industry organizations also taking the position that the holder of a

vested remainderman interest in adjacent property is not an affected person with respect to a concentrated animal feeding operation (“CAFO.”) The Amicus brief presents no arguments beyond those already presented by Applicant.

Applicant objects to Question One on the basis of the claim that the question goes beyond clarification of the applicable law, and asks that TCEQ review the ALJ’s decision. Question 1 presents a legal application of how the governing law should be applied. The ALJ in this case determined as a matter of law that a remainderman interest in adjacent property is not a right within the scope of those legal rights that should be considered a “justiciable interest.” Protestants’ challenge this legal finding, and because a remainderman interest in adjacent property is a legal right creating a potential for impact distinguishable from the general public, TCEQ’s decision is at risk of being overturned in court if TCEQ adopts the ALJ’s legal position.¹

Applicant further challenges that the owner of a remainderman interest in adjacent property is not “affected.” The adjacency of the interest demonstrates potential affectedness, without the need for a further examination. The special nature of adjacent property ownership is recognized by TCEQ’s requirement, under rule, that these persons be specifically identified in the application, with notice mailed to these persons of a proposed permit. With regard to odor, groundwater contamination, spray contamination, or surface water runoff, with regard to adjacent property and the potential for any contaminant migration at all creates the potential for an impact. As set forth in Protestants’ original brief, it is important to remember that a person need not demonstrate

¹ Protestants note that each of the issues presented are issues of law, thus courts would owe no deference to TCEQ in an appeal.

they have already been affected, only the potential of future impact if any fact question has been raised regarding the adequacy of the permit.

Applicant's brief is also based on the improper assumption that a contingent interest is involved. The certified question presented specifically involves a *vested* interest, and the Commission in this case is presented with the holder of a *vested* interest in adjacent property. Allowing a vested remainderman to protect his/her interest in a property does not infringe on the rights of the life-estate holder, as alleged by Applicant, since a remainderman holds a separate and independent property interest that may be affected by an application that warrants protection apart from the interest held by the life-estate holder. To foster certainty in property rights, Texas law strongly presumes early vestment of remainderman interests.² Even the death of Carol Robbins prior to the death of her mother will not destroy her interest – it would go to the owner of Carol Robbins' own estate, and Carol Robbins has an interest in preserving its value.

Given a remainderman's vested right to future use of property, and the ongoing nature of a CAFO permit, a potential certainly exists for such an owner's use of the property to be impacted by a CAFO.³ Under the five factor test established at 30 TAC § 55.203(c), the holder of a vested remainderman interest is affected. Environmental impacts on area property are clearly intended to be prevented by the law under which a CAFO permit is considered.⁴ No distance restriction exists in applicable law that could exclude an adjacent property owner. The adjacency of the property demonstrates a clear relationship between the property interest asserted and the activity regulated because of

² *Caples v. Ward*, 179 S.W. 341 (Tex. 1915) (“The law favors the vesting of estates at the earliest possible period, and will not construe a remainder as contingent where it can reasonably be taken as vested.”)

³ Protestants note that in this case the evidence demonstrates Ms. Carol Robbins already makes regular visits to the property.

⁴ See, e.g., 30 TAC §§ 321.31(b), 321.32(5), 321.40(d) & 321.40(e).

the elevated potential for impacts to occur as one moves closer to a site. If an impact on a person's use of property after the permit is issued is possible in any case, certainly that would include the case where a person will be using property adjacent to the facility. Furthermore, the most likely natural resources to be impacted by an application are those resources adjacent to a facility, and a vested remainderman has the right to future use of these resources that will be impacted by the adequacy of the now pending permit being issued.

II. SECOND AND THIRD QUESTIONS CERTIFIED BY THE ALJ

A. Response to OPIC and ED

Protestants agree with OPIC and the ED that the Commission should answer questions 2 and 3 in the affirmative, should the Commission choose to address these questions. As noted by the ED, TCEQ rules do not require that a person obtaining party status at a preliminary hearing have participated in any prior stage of the process. In adopting the applicable rules, the Texas Natural Resource Conservation Commission ("TNRCC," predecessor of TCEQ) explicitly rejected requests submitted in public comments from industry organizations that persons be required to demonstrate that they participated in prior stages of the permitting process to gain affected person status at the preliminary hearing.⁵ To answer either Question 2 or Question 3 "No" would reverse this agency position, and impose a requirement that at least one person appearing at the preliminary hearing not only show that they participated in prior stages of the permitting process, but also to prove up the nature of that participation. This contradicts House Bill 801, TCEQ rules, TCEQ's position in adopting rules implementing that legislation, as

⁵ 24 Tex. Reg. 8282 (Sep. 24, 1999)

well as both TCEQ and the State Office of Administrative Hearing's (SOAH) consistent practice in implementing those rules.

B. Response to Applicant and Amici

Applicant's brief improperly blurs the lines between the public comment and hearing request process, and the subsequent contested case process. In issuing the governing rules, TNRCC was careful to repeatedly note that these were two separate processes that needed to be approached separately.⁶

Once a matter has been set for a hearing at SOAH, the process is "reset" based on the issues referred. Anyone seeking to participate in that hearing, including a person whose request was granted, must seek party status and be granted such status by the ALJ. All persons wanting to be parties are on equal footing, with equal burdens and opportunities. Applicant essentially alleges that any person seeking party status is making a hearing request. The term "hearing request" has no meaning after a hearing has been set. TCEQ rules clearly allow for new persons to become parties at the preliminary hearing. This is an entirely different action than filing a hearing request.

Applicant confuses, and misrepresents, the law in stating that a person may not "request a hearing" at a preliminary hearing if no "sufficient, timely hearing request is in place." First, no party to this hearing is claiming that anyone may request a hearing at the preliminary hearing. As discussed, the question is whether a person may gain party status to a hearing that has already been set.

Furthermore, Applicant's statement implies that some entity other than the Commission can overturn the Commission's determination on a hearing request prior to

⁶ See, e.g., 24 Tex. Reg. 8282 (Sep. 24, 1999).

the preliminary hearing. Upon the granting of a hearing request, the matter is transferred to SOAH unless a motion for reconsideration is filed (which Applicant chose not to file in this case). After referral, the next opportunity for party input, or agency action, is the preliminary hearing (with the sole exception of a situation where all the persons whose hearing request are granted chose to withdraw their requests in writing).

Applicant cites 30 TAC § 22.201, 55.211, & 80.101 for the proposition that a “sufficient” or “valid” hearing request must be in place at the time of the preliminary hearing, implying that a hearing request may be judged “insufficient” or “invalid” after the granting of the request but before the preliminary hearing. While § 55.211(g) allows that a hearing may be cancelled if all persons’ whose request were granted withdraw their requests prior to the hearing,⁷ that is a circumstance where all persons whose request was granted have agreed to cancellation of the hearing and the matter. Likewise, § 80.101 is explicitly limited to circumstances where requesters withdraw their request prior to the hearing, or reach a settlement. Section 55.201 addresses only the process prior to the Commission’s decision on a hearing request, and by its own terms does not apply to the processing of a permit after a request has been granted. None of these sections, nor any other section of TCEQ rules, allow for any possibility that the hearing may be cancelled over the objection of a party whose request was granted.

Applicant’s argument on Question 3 assumes that it is possible for a hearing request to be granted by the Commission, but somehow found to be “insufficient” or “invalid” in the intervening period after the interim order is issued by the commission and the beginning of the preliminary hearing when the rules are clear that all persons able to show themselves affected may participate. Other than a motion to reconsider the

⁷ 30 TAC § 55.211(g)

Commission's decision filed with the Commission, or the withdrawal of all hearing requests not denied, no procedural mechanism exists under TCEQ rules for this to happen. Applicant's argument, which is based on an impossible event, must be rejected.

A person who's request is granted can be required to show themselves affected at the preliminary hearing after the contested case process has begun, but TCEQ does not allow a challenge to a hearing requester's affected person status prior to the preliminary hearing. This ensures that the decisions are made in an orderly process, and is intended to prevent the type of abuse of the process seen here, where Applicant created needless discovery and briefing burdens prior to the preliminary hearing by circumventing the process and seeking a deposition in District Court under false pretenses.

It is important to recognize that answering either question Two or Three could create unnecessary logistical nightmares for both the Agency and organizations seeking to participate in the permitting process. Associations must be able to be judged on their members at each point in time when a decision on affected person status is made. For example, a homeowner's association may represent residents of a neighborhood including certain homes unquestionably affected by a facility. If certified questions two, in particular, is answered "no," such a homeowners' association could be denied party status at SOAH simply because the owners of the relevant properties may have changed over the time required for TCEQ and SOAH to process the hearing request and set a hearing, which is often several years, despite the fact that the association is just as clearly affected at the time of the preliminary hearing as it was at the time of the consideration of its hearing request. This cannot be considered a rational approach.

Applicant's approach would further require ALJ's to rehash at a preliminary hearing all of the issues addressed by the Commission during the consideration of the hearing request at the Commission, creating unnecessary duplication in the permitting process. A person whose hearing request is granted already has the burden to present evidence at the preliminary hearing convincing an ALJ that they are "affected" in order for a hearing to proceed, if their request for party status is challenged. This provides an applicant adequate protection that the dispute underlying the proceeding is between parties with an actual stake in the outcome.

III. PRAYER

FOR THE REASONS SET FORTH ABOVE, Protestants respectfully pray that the Commission answer "Yes" to the first question certified to the Commission by the ALJ, and remand the matter to SOAH for continuation of the hearing. Should the Commission chose to address questions two and three referred by the ALJ, Protestants pray that the Commission also answer "Yes" to these questions.

Respectfully submitted,



Eric Allmon

Lowerre, Frederick, Perales & Allmon
44 East Ave, Suite 101

Austin, TX 78701

(512) 482-9345; (512) 482-9346 fax

ATTORNEY FOR PROTESTANTS

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that the foregoing was served to all parties listed below via facsimile transmission and first-class mail to the same on the 4th of February, 2008.



Eric Allmon

For the Applicant:

Leonard Dougal
Chris Pepper
Jackson Walker, L.L.P
100 Congress Avenue, Suite 1100
Austin, Texas 78701
Fax: (512) 236-2002

For the Executive Director:

Robert Brush, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC 173
PO Box 13087
Austin, Texas 78711-3087
Fax: (512) 239-0606

For the Office of Public Interest Counsel:

Garrett Arthur, Attorney
Texas Commission on Environmental Quality
Office of Public Interest Counsel, MC-103
PO Box 13087 Austin, Texas 78711-3087
Fax: (512) 239-6377

For the State Office of Administrative Hearings:

Via facsimile only

ALJ Roy Scudday
State Office of Administrative Hearings
300 West 15th St, Suite 502
Austin, Texas 78701
(512) 475-4993