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December 28, 2007

CHIEF CLERKS OFFICE

2007 DEC 28 PM 12:39

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

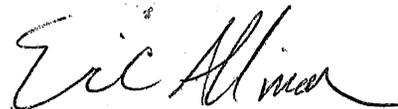
**Re: Application by Hidden View Dairy for TPDES Permit No. WQ03197.
TCEQ Docket No. 2007-0831-AGR, SOAH Docket No. 582-08-0007**

Dear Ms. Castañuela,

Please find enclosed for filing an original and eleven copies of the **Brief of Sierra Club and Pritchey Smith Regarding Certification of Questions** in the above-referenced matter. This document was filed by facsimile transmission yesterday, December 27th.

If you have any questions please call.

Sincerely,



Eric Allmon

Enclosures

cc: Service List

SOAH DOCKET NO. 582-08-0007 DEC 28 PM 12: 39
TCEQ DOCKET NO. 2007-0831-AGR

IN THE MATTER OF THE §
APPLICATION OF HIDDEN VIEW §
DAIRY FOR TCEQ WATER QUALITY §
PERMIT NO. 03197 §

CHIEF CLERKS OFFICE
BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

**BRIEF SIERRA CLUB AND PRITCHY SMITH REGARDING
CERTIFICATION OF QUESTIONS**

TO THE HONORABLE COMMISSIONERS:

Comes now the Sierra Club (the "Club") as well as Dr. Pritchey Smith, (collectively "Protestants") and files this, their Brief Regarding Certification of Question. Protestants would respectfully show the following:

I. FIRST QUESTION CERTIFIED BY ALJ

The 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?

The answer to this question is governed by the application of Texas Water Code § 5.115, and 30 TAC § 55.203. The Commission has never directly addressed this question which turns on the interpretation of applicable statutes. This question of interpretation governs the ALJ's determination of whether Ms. Carol Robbins is an affected person, however. The Commission's order granting the Sierra Club's hearing request was based on a finding that Carol Robbins is an adjacent landowner. No evidence has been presented demonstrating otherwise. She may not be a fee simple adjacent landowner as applicant represented in its application, but she is an adjacent landowner.

Carol Robbins owns a vested property interest in property adjacent to the facility to be authorized under the proposed permit. This property interest is in the form of a

remainderman interest.¹ Applicant alleges that because Ms. Robbins does not own a possessory right in the property, her interest does not provide a valid basis for a finding that she is an affected person. This is inconsistent with the principle established by Texas courts that a justiciable interest can take many forms, and may or may not involve a vested property right.² The proper question is whether Carol Robbins could be potentially harmed by the exercise of the permit under consideration.³ The answer is clearly "Yes." While Ms. Robbin's mother has the right to use the land currently, Carol Robbins *currently* owns the corpus of the property, and has an interest in ensuring that the quality of the property is preserved so that she may enjoy the use of the property once her vested possessory interest in the property ripens.

The permit would authorize the application fields, waste holding lagoons, and animal housing structures in close proximity to her property. If the odor controls on these activities are not adequate, Ms. Robbins ability to use her property after the expiration of the life-estate will be impacted. Furthermore, the application authorizes the location of off-site application fields without specifying the location of those fields. Such fields could be located upstream of Ms. Robbins' property, leading to the runoff of contaminants downstream onto the property owned by Carol Robbins, and impacting her ability to use that property after the expiration of the life estate. Since Carol Robbins holds an interest that could potentially be adversely impacted by the proposed permit in a manner not common to the general public, she is an affected person. Protestant's support certification of this question.

¹ Sierra Club Exhibit 1, Last Will and Testament of Ben E. Robbins.

² *Texas Rivers Protection Association v. Texas Natural Resource Conservation Commission*, 910 S.W.2d 147 (Tex. App. – Austin, 1995).

³ *Id.*

II. SECOND QUESTION CERTIFIED BY THE ALJ

If the Commission answers the first question “no,” the ALJ seeks an answer to the following:

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?

No applicable statutory or regulatory provision provides that an association is limited in seeking party status at SOAH to rely upon the same members as were cited in hearing requests previously filed and granted. To the contrary, SOAH regularly renders judgment on an association’s status as an affected person based simply upon the members that the association is able to produce at the preliminary hearing. The Commission has already clearly established in the preamble to the adoption of Chapter 80 that no person seeking party status at a preliminary hearing is even required to show that they *participated* in any previous stage of the permitting process,⁴ and this is the well-established practice of both TCEQ and SOAH. This fully addresses the question posed by Applicant, since requiring an association seeking party status to rely on the same person as was cited in a prior hearing request would go even beyond imposing a requirement that that association have previously participated in the process, to the point of imposing a requirement that the association prove up the contents of documents submitted during prior stages of the permitting process as a qualification for party status. Neither statute nor rule include any

⁴ 24 Tex. Reg. 8282 (Sep. 24, 1999)

such requirement, so the answer to this question is clearly “Yes.” No certification is required to clarify this question.

III. THIRD QUESTION CERTIFIED BY ALJ

The ALJ also seeks an answer to the following question, should the Commission determine a remainderman interest not to be a justiciable interest.

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?

It is the Commission’s role to grant or deny a hearing request.⁵ If an applicant for a permit objects to the Commission’s decision to grant a hearing request, it may file a motion for reconsideration with the Commission to ask that the Commission reconsider its decision.⁶ This is the proper mechanism to challenge the granting of a hearing request. Applicant in this case filed no such motion with the TCEQ.

Once a hearing request has been granted and the Commission has referred a matter to SOAH for hearing, SOAH is required to hold a preliminary.⁷ At that hearing, it is the ALJ’s role to determine the parties to the hearing.⁸ At the preliminary hearing, any person is entitled to seek party status, regardless of whether any person filing a hearing request that led to the hearing even appears at the preliminary hearing. The sole requirement for party status before SOAH is a demonstration that the person seeking party status demonstrate a justiciable interest.⁹ The preliminary hearing is not the time for persons to collaterally attack the Commission’s decision to grant a hearing request,

⁵ 30 TAC § 55.255, Tex. Water Code § 5.556(b)(“The commission shall act on a hearing request during the period provided by commission rule.”)

⁶ See, e.g., Motion for Reconsideration filed by Asarco Incorporated, TCEQ Docket No. 2004-0049-AIR.

⁷ 30 TAC §§ 80.105, 80.101

⁸ 30 TAC § 80.4(c)(5).

⁹ 30 TAC § 80.109(a)

and an ALJ is not expected to reconsider whether or not the Commission's decision to hold a hearing was appropriate. If persons showing themselves to be affected persons gain party status, then the matter remains contested, and a hearing must proceed.

Any person seeking party status at a hearing may be required to present evidence showing themselves to be affected, including persons who were granted a hearing by the Commission. The ALJ, however, lacks the authority to reconsider the hearing requests filed in the matter and determine whether they met all applicable requirements, including whether those hearing requests were specifically made by an affected person. No certification is required to determine the answer to this question.

IV. PRAYER

FOR THE REASONS SET FORTH ABOVE, Protestants respectfully pray that the Commission certify the first question referred in Order No. 2 issued by the Administrative Law Judge.

Respectfully submitted,



Eric Allmon

Lowerre & Frederick

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ATTORNEY FOR PROTESTANTS

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that the foregoing was also served to all parties listed below via facsimile transmission on the 27th day of December, 2007, and mailed to the same on the 28th of December, 2007.



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For the State Office of Administrative Hearings:

Via facsimile only

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