

TCEQ DOCKET NUMBER 2007-0831-AGR
SOAH DOCKET NUMBER 582-008-007

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APPLICATION BY HIDDEN
VIEW DAIRY FOR PERMIT
NO. WQ0003197000

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BEFORE THE CHIEF CLERKS OFFICE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S FILING REGARDING CERTIFIED QUESTIONS IN THE
HIDDEN VIEW DAIRY SOAH CASE**

I. Introduction

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this brief in response to the three questions certified to the Commission by Administrative Law Judge (ALJ) Roy Scudday. The ED's recommendation is that a remainder interest is not sufficient to demonstrate "affected person" status. However, the State Office of Administrative Hearings (SOAH) may proceed with the hearing. The TCEQ's rules provide that persons may seek party status at the preliminary hearing when a matter is referred to SOAH because the granting of a hearing request is an interlocutory decision on the validity of the request and is not binding on the issue of designation of parties.

II. Background

This application is for a major amendment of an existing Confined Animal Feeding Operation (CAFO) registration and conversion of the registration to an individual permit. Hidden View Dairy (the applicant) proposes to authorize an increase in the number of dairy cattle at the CAFO from 2,000 head to 3,000 head. The facility has five retention control structures and includes nine land management units. It is located in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River Basin.

The Sierra Club requested a contested case hearing (CCH) on the application. At the Commission agenda on August 22, 2007, the Commission found that the Sierra Club was an affected person based on the Sierra Club membership of Ms. Carol Robbins. The Commission found that Ms. Robbins had standing in her own right as an affected person and therefore, Sierra Club had associational standing based upon her membership.

Initially, in the CCH filing, the Sierra Club did not identify Ms. Robbins as the member who was an affected person because of the alleged fears of revenge or retribution she might suffer for protesting the application. Sierra Club's filing included an affidavit signed by the President of the Lone Star Chapter of the Sierra Club, Mr. Ken Kramer, asserting that the unidentified member was

the owner of property adjacent to the facility or within one mile downstream on the discharge route.¹ Subsequent to filings by the ED, applicant, and OPIC, Sierra Club filed a response identifying Ms. Robbins as the unidentified member and stating that Ms. Robbins was an “owner of an indivisible interest in property adjacent to the northern boundary of the facility.” Sierra Club disclosed Ms. Robbins’ identity after all the other parties had an opportunity to respond to whether she was an affected person.² The Commission found “that Carol Robbins [was] an adjacent landowner and, therefore, [was] an affected person.”³

The Commission referred the case to SOAH and, prior to the November 8, 2007 preliminary hearing, the applicant filed a motion to strike the Sierra Club as a party because Ms. Robbins held a future interest in the property and had no current interest. At the preliminary hearing, the ALJ heard evidence regarding Ms. Robbins’ interest in the property, including oral testimony from Ms. Robbins. It was determined that Ms. Robbins owned a remainder interest in the property left to her through her father’s will. In *SOAH Order No. 1* issued on November 27, 2007 establishing the parties, the judge ruled that based on Ms. Robbins’ lack of a current interest in the property she was not an affected person with respect to the Hidden View application. This ruling left the Sierra Club without the member who satisfied the requirements for associational standing as set out in the hearing request that the Commission acted upon at its August 22, 2007 agenda.

However, at the November 8 preliminary hearing, Sierra Club identified Mr. Pritch Smith a new member who is an adjacent landowner to the dairy. Mr. Pritch Smith also sought party status on his own behalf. Mr. Smith was not able to attend the preliminary hearing but was represented by two of his sons. The ALJ authorized the applicant to take Mr. Smith’s deposition regarding how he was affected via phone. In Mr. Smith’s telephone deposition of November 15, 2007, he testified he had joined the Sierra Club “about a month ago” or almost two months after the Commission referred the case to SOAH. Mr. Smith also testified that he was an adjacent landowner to the dairy and testified how he was affected by the dairy operation. The ALJ determined that Mr. Smith was an affected person both individually and as a member of the Sierra Club and designated Sierra Club as a party despite the loss of Ms. Robbins.

Following that order, the applicant filed a “Plea to the Jurisdiction or in the Alternative Motion to Certify Questions to the Commissioners” on December 7, 2007 and the Sierra Club and Mr. Smith filed a reply with an alternative certified question. Judge Scudday issued an order on December 18, 2007 denying the Plea to the Jurisdiction and certifying three questions proposed by both the applicant and the Sierra Club to the Commission.⁴ The applicant filed a response to Sierra Club’s and Mr. Smith’s reply on December 18, but it does not appear that the ALJ considered this response before issuing his SOAH Order No. 2.

1 As noted in the ED’s Response to Hearing Request, a CAFO permit does not authorize a discharge, unless there is a catastrophic rainfall event, so there is no discharge route noted in the permit.

2 After the Sierra Club identified Ms. Robbins, the applicant filed a motion to strike and the Sierra Club filed a response to that motion. However, those pleadings were filed outside the briefing schedule established by 30 TAC § 55.209.

3 *Interim Order*, p. 1, TCEQ, August 31, 2007.

4 SOAH Order No. 2 (December 18, 2007).

III. Certified Question No. 1

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?

Judge Scudday poses this question first, because he asserts that if Ms. Robbins is an affected person, the other questions are moot.

A person must be an "affected person" to obtain a CCH on an application. TEX. WATER CODE §5.556; 30 TAC § 55.201. An "affected person" is a person who has a "personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." TEX. WATER CODE §5.115(a); 30 TAC § 55.203(a). Section 55.203(c) of title 30 of the TAC outlines factors to be considered in determining whether a person is an affected person:

- (c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:
 - (1) whether the interest claimed is one protected by the law under which the application will be considered;
 - (2) distance restrictions or other limitations imposed by law on the affected interest;
 - (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
 - (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
 - (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
 - (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

A remainderman does not have a current, possessory interest in property. Therefore, since Ms. Robbins does not have a possessory interest at this time and resides in Dallas, the regulated activity is unlikely to impact her health and safety or her uses of the property. Accordingly, Ms. Robbins lack of a current possessory interest in the property makes it unlikely that operation of a CAFO would impact her use of any natural resources. Additionally, it is reasonable that a person be required to have a present possessory interest in adjacent land to be affected by a CAFO application. The most reasonable view is that a remainderman is not an affected person in this proceeding and the ED agrees with the ALJ's determination that Ms. Robbins is not an affected person.

IV. Certified Questions Nos. 2 & 3

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 purposes 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?

There are no TCEQ rules that specifically address the fact presented by this case. However, TCEQ rules do provide that the initial Commission decision to grant a hearing request may be challenged at the preliminary hearing. 30 TAC § 55.211(e) states:

If a request for a contested case hearing is granted, a decision on a request for . . . contested case hearing is an interlocutory decision on the validity of the request or issue and is not binding on the issue of designation of parties under §80.109 of this title (relating to the Designation of Parties) or the issues referred to SOAH under this section. . . . A person whose request for . . . contested case hearing is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on an application.

Furthermore, 30 TAC § 80.109(a) states:

Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. . . .

Section 80.109 does not require that a person must participate in the public participation process before the Commission in order to be designated as a party.

The first cited rule allows an ALJ to determine whether a hearing request is valid and deny party status to the person whose hearing request was granted by the Commission. The second cited rule allows Mr. Smith to come forward at the preliminary hearing, show how he is an affected person with a personal justiciable interest in the permitting matter, and be granted party status by the ALJ. Mr. Smith made such a showing in the judgment of the ALJ and was named a party in this matter. Therefore, regardless of whether the Sierra Club has associational standing, there is still a party contesting this application and the ALJ may not remand this matter the ED as contemplated in 30 TAC § 80.101.⁵

⁵ "At the request of the applicant, a judge shall remand an application to the executive director if all timely hearing

V. Conclusion

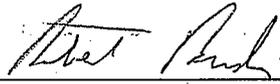
The ED would answer no to Certified Question No. 1. In regards to Certified Question Nos. 2 and 3, while the rules do not address the fact questions presented in this case, the rules do allow for persons who have not previously participated to seek party status at the preliminary hearing. Therefore, the ED would answer yes to Certified Question Nos. 2 and 3, as worded.

Respectfully submitted,

TEXAS COMMISSION ON
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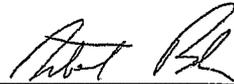
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requests have been withdrawn or denied or, if parties have been named, all parties to a contested case reach a settlement so that no facts or issues remain controverted. After remand, the application shall be uncontested and the applicant is deemed to have agreed to the action of the executive director. The executive director may act on the application or set it for a commission meeting." 30 TAC § 80.101.

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2007 the original and eleven true and correct copies of the "Executive Director's Filing in Regarding Certified Questions in the Hidden View Dairy SOAH Case" relating to the application of Hidden View Dairy, Permit No. WQ0003197000 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.



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