

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*



TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Blas J. Coy, Jr., *Public Interest Counsel*  
2008 JAN 22 PM 4: 36

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE

*Protecting Texas by Reducing and Preventing Pollution*

January 22, 2008

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

Re: **HIDDEN VIEW DAIRY**  
**TCEQ DOCKET NO. 2007-0831-AGR**  
**SOAH DOCKET NO. 582-08-0007**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Brief Regarding Certified Questions in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure

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SOAH DOCKET NO. 582-08-0007

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CHIEF CLERKS OFFICE

APPLICATION BY  
HIDDEN VIEW DAIRY TO AMEND  
TPDES PERMIT NO. WQ0003197000

§ BEFORE THE  
§ TEXAS COMMISSION ON  
§ ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL'S  
BRIEF REGARDING CERTIFIED QUESTIONS**

**To the members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or the "Commission") files this brief regarding certified questions.

**I. Background**

The Commission, on August 31, 2007, issued an interim order granting the hearing request filed by the Lone Star Chapter of the Sierra Club ("Sierra Club") and referring this matter to the State Office of Administrative Hearings (SOAH). The Sierra Club relied on the affected person status of Carol Robbins to demonstrate that the organization had an affected member as required by TCEQ's group standing rule.<sup>1</sup> The preliminary hearing was held November 8, 2007, and in Order No. 1, the Administrative Law Judge (ALJ) granted party status to the Sierra Club and individual Sierra Club member Pritch Smith ("Protestants"), but denied party status to Carol Robbins. On December 18, 2007, the ALJ, in response to motions from Hidden View Dairy ("Applicant") and the Protestants, certified to the Commission three questions.

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<sup>1</sup> 30 TEX. ADMIN. CODE (TAC) § 55.205.

## II. Certified Questions

### A. Question No. 1

Question No. 1 was requested by the Protestants, and the ALJ has stated that an affirmative answer to this question will render moot the two remaining questions.<sup>2</sup>

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?**

Yes. An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by an application, and an interest common to members of the general public does not qualify as a personal justiciable interest.<sup>3</sup> A vested remainder is defined as a remainder that is given to an ascertained person and that is not subject to a condition precedent.<sup>4</sup> According to the terms of her father's will, Carol Robbins' has a vested remainder interest in land adjacent to the Applicant's operation.<sup>5</sup> The ALJ has found that Ms. Robbins' vested remainder interest is not sufficient to qualify her as an affected person.<sup>6</sup> OPIC respectfully disagrees.

According to the § 55.203 definition of an affected person, the requisite personal justiciable interest can be related to a legal right affected by an application. A vested remainderman interest certainly qualifies as a legal right. In fact, "vested" is defined as "[h]aving become a completed, consummated *right* for present or future enjoyment ..."<sup>7</sup> Ms. Robbins' vested remainder interest is a legal right in real property--property which is adjacent to

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<sup>2</sup> SOAH Order No. 2, p. 4.

<sup>3</sup> 30 TAC § 55.203(a).

<sup>4</sup> BLACK'S LAW DICTIONARY 1318 (8th ed. 2004).

<sup>5</sup> Sierra Club Exhibit 1, Last Will and Testament of Ben E. Robbins, Article III.

<sup>6</sup> SOAH Order No. 2, p. 4.

<sup>7</sup> BLACK'S LAW DICTIONARY 1595 (8th ed. 2004) (emphasis added).

and could be adversely impacted by the dairy. For this reason, Ms. Robbins' vested remainder interest gives her a personal justiciable interest which is not common to members of the general public, and she therefore qualifies as an affected person. OPIC asserts that Question No. 1 should be answered in the affirmative.

**B. Question No. 2**

Question No. 2 was requested by the Applicant, and according to the ALJ's Order, should be considered only if the answer to Question No. 1 is "No". Question No. 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?**

Yes. In the TCEQ rules regarding contested case hearings, § 80.109(a) states that all parties to a proceeding shall be determined at the preliminary hearing.<sup>8</sup> Additionally, §55.211(e) states that a person whose hearing request is denied may still seek to be admitted as a party if any hearing request is granted on an application.<sup>9</sup> Section 55.211(e) further states that a Commission decision on a hearing request, which necessarily involves an affected person determination, is not binding on the issue of designation of parties by the ALJ at the preliminary hearing.<sup>10</sup> As clearly allowed and contemplated under Chapters 55 and 80, it has been the longstanding practice of the TCEQ that anyone may appear at the preliminary hearing to seek party status. It is not at all uncommon for a person to first appear at a preliminary hearing and be named as a

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<sup>8</sup> 30 TAC § 80.109(a).

<sup>9</sup> 30 TAC § 55.211(e).

<sup>10</sup> *Id.*

party without having been previously determined an “affected person” by the Commission.<sup>11</sup>

This is Pritchey Smith’s situation, and he has been granted individual party status in this proceeding.

Assuming that the other requirements for group standing are met<sup>12</sup>, nothing in the TCEQ rules prevents Mr. Smith, as a member of the Sierra Club, from conferring party status on the Sierra Club. The Applicant objects to the timing of Mr. Smith’s membership in the Sierra Club, but again, nothing in the TCEQ rules prevents an organization from using a new member to satisfy the group standing requirements of § 55.205. OPIC finds that Certified Question No. 2 should be answered in the affirmative.

**C. Question No. 3**

Question No. 3 was requested by the Applicant, and according to the ALJ’s Order, should be considered only if the answer to Question No. 1 is “No”. Question No. 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?**

Yes. This question appears to imply that because the ALJ found that Carol Robbins is not an affected person, the Sierra Club’s hearing request should retroactively be deemed invalid. However, under § 55.211(e), a decision on a hearing request is an interlocutory decision on the

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<sup>11</sup> See Tejas Viejo, TCEQ Docket No. 2005-1010-MWD, SOAH Docket No. 582-06-0399; Midtex, TCEQ Docket No. 2005-1720-MWD, SOAH Docket No. 582-06-1581; City of Weston, TCEQ Docket No. 2006-0199-MWD, SOAH Docket No. 582-06-2770; Marlin Atlantis White, Ltd., TCEQ Docket No. 2006-1572-MWD, SOAH Docket No. 582-08-0203.

<sup>12</sup> As provided by 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

validity of the request and is not binding on the issue of designation of parties.<sup>13</sup> In other words, the ALJ makes the decision on party status and is not bound by a Commission decision to grant or deny a hearing request. The authority of the ALJ to designate parties cannot be negated by retroactively examining the Commission's decision on a hearing request. Therefore, OPIC continues to find that Pritchey Smith and the Sierra Club were properly designated as parties following the preliminary hearing, and asserts that Certified Question No. 3 should be answered in the affirmative.

### **III. Conclusion**

For the reasons stated herein, OPIC respectfully recommends that the certified questions be answered as follows:

Question No. 1: Yes

Question No. 2: Yes

Question No. 3: Yes

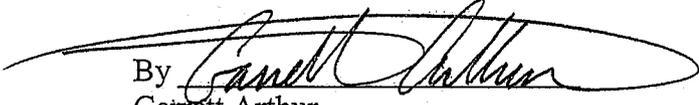
OPIC also agrees with the ALJ's position that a "Yes" answer to Question No. 1 moots Questions 2 and 3.

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<sup>13</sup> 30 TAC § 55.211(e).

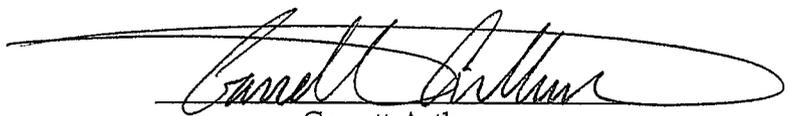
Respectfully submitted,

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### CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2008, the original and eleven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.

  
Garrett Arthur

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