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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 16, 2009

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

2009 JAN 16 PM 1:56
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: **CAVINESS BEEF PACKERS, LTD.**
TCEQ DOCKET NO. 2008-1764-AIR

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in black ink that reads "Eli Martinez".

Eli Martinez, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. Box 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

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TCEQ DOCKET NO. 2008-1764-AIR

2009 JAN 16 PM 1:56

IN THE MATTER OF
THE APPLICATION BY
CAVINNESS BEEF
PACKERS FOR AIR
PERMIT NO. 81570

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY
CHIEF CLERKS OFFICE

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO HEARING
REQUESTS**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas
Commission on Environmental Quality (the Commission or TCEQ) and files this
Response to Hearing Requests in the above-referenced matter.

I. PROCEDURAL HISTORY

Caviness Beef Packers, Ltd. has applied to the TCEQ for a New Source Review
Authorization under Texas Clean Air Act (TCAA) §382.0518. This permit will authorize
the Applicant to construct a beef rendering facility. The facility will be located at 3255
West U.S. Highway 60, Hereford, Deaf Smith County, Texas. Contaminants to be
authorized under this permit include: volatile organic compounds, sulphur dioxide,
carbon monoxide, nitrogen oxides, particulate matter including particulate matter less
than 10 microns in diameter, hydrogen sulphide, and ammonium.

The application for the permit was received on April 9, 2007. The application
was declared administratively complete on April 27, 2007. The Notice of Receipt of
Application and Intent to Obtain an Air Quality Permit was published on May 8, 2007 in
The Hereford Brand. Timely hearing requests were filed on June 4, 2007 by Mike and
Evelyn Morrison and on June 5, 2007 by Kevin Sanders. The Notice of Application and

Preliminary Decision was published on June 13, 2008 in *The Hereford Brand*. On May 8, 2007 and June 13, 2008, alternative notices were additionally published in *The Hereford Brand*. The public comment period ended on July 14, 2008. The Chief Clerk mailed the Executive Director's Response to Public Comment and Decision on October 9, 2008. The deadline for submitting a hearing request was November 10, 2008.

II. APPLICABLE LAW

Under the applicable statutory and regulatory requirements, a person requesting a hearing must file the request in writing with the chief clerk no later than 30 days after the chief clerk's transmittal of the executive director's decision and response to comments. 30 TAC §55.201(a) and (c). For air authorizations, a hearing request must be filed during the first comment period in order for the authorization to be subject to further notice and public participation opportunities. TEXAS HEALTH & SAFETY CODE §382.056(g). Therefore, timely requests for air authorizations include all requests filed in response to the Notice of Intent to Obtain Permit, as well as any additional requests subsequently filed during the comment period and the 30-day period following the transmittal of the executive director's response to comments.

The request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility of activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and

provide any other information specified in the public notice of application. 30 TAC §55.201(d).

Under 30 TAC §55.203(a), an affected person is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” This justiciable interest does not include an interest common to the general public. 30 TAC §55.203(c) sets forth relevant factors that will be considered in determining whether a person is affected. These factors include:

- 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, safety, and 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.

The commission shall grant an affected person’s timely filed hearing request if:

(1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission’s decision on the application. 30 TAC 55.211(c).¹

Accordingly, pursuant to 30 TAC §55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;

¹ A hearing request can not be based on an issue raised solely in comments that have been withdrawn by written letter filed with the chief clerk prior to the filing of the executive director’s response to comments. 30 TAC §55.211(c)(2)(A).

- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

III. DISCUSSION

A. All of the Requestors are Affected Persons

According to the map prepared by the executive director's staff, requestor Kevin Sanders is located .43 miles from the proposed facility. Requestors Mike and Evelyn Morrison are located 1.43 miles from the proposed facility.

Each requestor has stated a concern that his or her health, or the health of the requestors' family or employees, will be adversely affected by emissions of air contaminants from the facility, in addition to stating concerns regarding how pollution from the proposed facility may adversely affect air quality and their use and enjoyment of their property. 30 TAC §55.203(c)(4); 30 TAC §101.4. Each requestor also raises the concern that the proposed facility will present nuisance conditions such as odors or vectors. 30 TAC §101.4. Mr. Sanders additionally raises concerns relating to compliance history and violation of Administrative Code provisions concerning control of hydrogen sulfide. Health and Safety Code §382.0518(c); 30 TAC §112.31.

The proximity of these requestors' residences or workplaces to the proposed facility and interest in protecting their health support a finding that they are "affected persons. 30 TAC § 55.203(c). The requestors state concerns protected by the law under which the application will be considered, including the health of the individual

requestors, their families, and their employees. 30 TAC §55.203(c)(1). In addition, because the requestors reside within close proximity to the proposed facility, requestors have shown a reasonable relationship between the interests stated and the activity regulated. 30 TAC § 55.203(c)(3). Therefore, OPIC recommends that the Commission find that all requestors discussed above are affected persons.

B. Issues raised in the Hearing Requests

1. Mr. and Mrs. Morrison and Mr. Sanders raise the concern that emissions from the proposed facility will negatively affect human health.
2. Mr. and Mrs. Morrison and Mr. Sanders raise the concern that emissions from the proposed facility will negatively affect the environment.
3. Mr. and Mrs. Morrison and Mr. Sanders raise the concern that emissions from the proposed facility will negatively affect use and enjoyment of their property.
4. Mr. and Mrs. Morrison and Mr. Sanders raise the concern that emissions from the proposed facility will create nuisance conditions.
5. Mr. Sanders raises the concern that Applicant's compliance history warrants denial of the permit.
6. Mr. Sanders raises the concern that Applicant's activities will result in the violation of provisions regulating hydrogen sulfide levels.
7. Mr. and Mrs. Morrison raise the concern that Applicant's activities may make it harder to attract employees for work on their farm.

C. Issues raised in Comment Period

The issues raised in the hearing requests were also raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A).

D. Disputed Issues

There is no agreement between the Requesters and the Applicant or Executive Director on the issues raised in the hearing requests.

E. Issues of Fact

If an issue is one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. *See* 30 TAC

§55.211(b)(3)(A) and (B). OPIC finds that all issues raised by affected persons are issues of fact.

F. Relevant and Material Issues

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.¹ Relevant and material issues are those that are governed by the substantive law under which this registration is to be issued.² The issues concerning health effects on human life,³ the environment,⁴ use and enjoyment of property,⁵ nuisances conditions,⁶ compliance history,⁷ and hydrogen sulfide levels⁸ are all relevant and material to the commission decision on this application because they relate to whether Applicant can comply with the terms of the permit.

The remaining issue of ability to attract employees falls outside the scope of TCEQ jurisdiction with respect to this application. Because this application concerns air quality, TCEQ's jurisdiction in proceeding in this matter is limited to safeguarding the state's air resources from pollution, as implicitly authorized by Chapter 382 of the Health and Safety Code. Potential effects on employee recruitment are not addressed by the substantive law governing this application and are not considered relevant and material to

¹ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

² *Id.*

³ Health and Safety Code §382.0518(b)(2).

⁴ Texas Clean Air Act § 382.002

⁵ *Id.* See also Health and Safety Code §382.002(a).

⁶ 30 TAC §101.4

⁷ Health and Safety Code §382.0518(c).

⁸ 30 TAC §112.31.

the Commission's decision. OPIC therefore finds that this issue is inappropriate for referral to the State Office of Administrative Hearings.

G. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing.

1. Will emissions from the proposed facility negatively affect human health?
2. Will emissions from the proposed facility negatively affect the environment?
3. Will emissions from the proposed facility negatively affect the requestors' use and enjoyment of their property?
4. Will emissions from the proposed facility create nuisance conditions?
5. Does the Applicant's compliance history warrant denial of the permit?
6. Will the Applicant's activities result in the violation of 30 TAC §112.31, relating to limitations upon hydrogen sulfide levels?

H. Maximum Expected Duration of Hearing

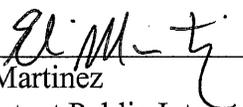
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC concludes that Mr. and Mrs. Morrison and Mr. Sanders are affected persons and recommends that the Commission grants their requests for a contested case hearing and refers this application to the State Office of Administrative Hearings. Pursuant to 30 TAC§55.209(e)(7), OPIC recommends a hearing duration of nine months from the date of the preliminary hearing until the date of the issuance of the proposal for decision.

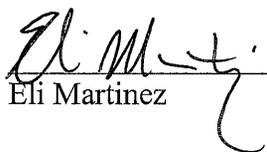
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2009 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Hearing Requests 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


Eli Martinez

CHIEF CLERKS OFFICE

2009 JAN 16 PM 1:56

TEXAS
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QUALITY

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TCEQ DOCKET NO. 2008-1764-AIR

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