TCEQ DOCKET NO. 2015-0664-MWD

APPLICATION BY JPHD, INC., FOR LAND APPLICATION PERMIT WQ0015201001	**§ § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

PROTESTANT HPR MATTERS' MOTION TO STRIKE JPHD, INC.'S REPLY TO RESPONSES TO HEARING REQUESTS, AND, IN THE ALTERNATIVE, MOTION FOR CONTINUANCE

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

Consistent with TCEQ precedent, Hamilton Pool Road Matters (HPR Matters) moves to strike JPHD, Inc.'s ("JPHD") Reply to the Executive Director's and the Office of Public Interest Counsel's Responses to Hearing Requests.

I. TCEQ RULES ESTABLISH A CLEAR BRIEFING PROCEDURE THAT ALLOWS A REQUESTER, BUT NOT AN APPLICANT, TO FILE A REPLY

In its rules, TCEQ has established an orderly procedure by which hearing requests are to be considered by the Commission. Once a hearing request has been set for consideration by the Commission at a public meeting, the Executive Director, the Office of the Public Interest Counsel, and the applicant each may submit written responses no later than 23 days before the meeting, which must address specific questions.[1] Subsequently, the requestors may submit written replies no later than nine days prior to a commission meeting.[2]

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[1] 30 TAC § 55.209(d).
[2] 30 TAC § 55.209(g).

On at least one prior occasion, the Commission has declined to consider such late filings by an applicant in the consideration of a hearing request. In the Matter of the Application of Hidden View Dairy for TCEQ Water Quality Permit No. 03197, the applicant attempted to submit additional filings with regard to a hearing request after the deadline for its Response.[3] While made aware of the existence of the filings, the Commissioners themselves publicly made clear that the General Counsel had not distributed the filings to the Commissioners.[4] It would be appropriate for the Commission, and the General Counsel, to take the same approach in this case.

This type of process, by which the requestors have the opportunity to provide the reply in light of all information provided by opposing parties, is consistent with the relative burdens at this stage of the proceeding. At the hearing request stage, in order to demonstrate the right to a contested case hearing, the requester bears a burden to show that they are an "affected person" and to demonstrate compliance with procedural requirements as well as those related to the issues presented. The burden is not a preponderance of the evidence standard on either the existence of adverse impacts, or on the merits of the application, but the requestors bear a burden of persuasion to demonstrate compliance with applicable statutes and regulations. For this reason, it is reasonable to ensure that the hearing requester be given the opportunity to offer a reply to all arguments made against the hearing requester.

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[3] TCEQ Docket No. 2007-0831-AGR.

[4] Discussion of Hidden View Dairy Matter at August 22, 2007 TCEQ Agenda Meeting (Item No. 3), available at www.texasadmin.com/agenda.php?confid=TCEQ_OM082207&dir=tnrcc.

The allowance for an applicant to file a reply to responses is inconsistent with the language of TCEQ's rules. The requirement that an applicant file a response to a request no later than 23 days before the commission meeting is rendered meaningless if the applicant, itself, is entitled to file a reply. Since OPIC and the Executive Director always file timely responses to the hearing requests, an applicant could simply await the reply deadline in order to present its arguments, thereby denying the protestant an opportunity to address the applicant's arguments. The very purpose of an explicit deadline for the applicant's response is to ensure that the hearing requester is provided a full opportunity to reply to all responses. To accomplish that, the applicant's deadline established in the rules should be enforced.

II. IN THE ALTERNATIVE, HPR MATTERS SEEKS A CONTINUANCE OF COMMISSION CONSIDERATION OF THEIR HEARING REQUEST

If the Commission decides to consider JPHD's Reply, it would unduly prejudice HPR Matters, since it would deny HPR Matters the opportunity to reply to all arguments presented against it. Accordingly, should the Commission decide to consider Applicant's Reply, HPR Matters respectfully requests that the matter be continued to a subsequent Commission agenda meeting, with HPR Matters being permitted to file a reply to each filing submitted in opposition to its hearing request.

III. PRAYER

For the reasons set forth above, HPR Matters respectfully prays that the Commission strike JPHD, Inc.'s Reply to the Executive Director's and the Office of Public Interest Counsel's Responses to Hearing Requests. In the alternative, HPR Matters respectfully

requests that the Commission continue the consideration of this matter to a later agenda, and provide HPR Matters with an opportunity to reply to all filings submitted in opposition to its hearing requests.

Respectfully Submitted,

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COUNSEL FOR HPR MATTERS

CERTIFICATE OF CONFERENCE

By my signature, below, I certify that I have conferenced with Vic McWherter, Public Interest Counsel; Ashley McDonald, counsel for the Executive Director; and Edmond McCarthy, Jr., counsel for Robert Ayres and Shield Ranch, regarding the contents of HPR Matters' Motion to Strike. Counsel for the Office of Public Interest Counsel and counsel for Robert Ayres and Shield Ranch support HPR Matters' Motion to Strike. Counsel for the Executive Director takes no position on this Motion. Counsel for Applicant, David Tuckfield, has been notified of the contents of this Motion. HPR Matters presumes JPHD, Inc., is opposed to this Motion, and has not been informed otherwise.

Eric Allmon

CERTIFICATE OF SERVICE

I, Eric Allmon, hereby certify that on June 23, 2015, the foregoing document was electronically filed with the Chief Clerk at the Texas Commission of Environmental Quality in accordance with TCEQ rules and the instructions as set forth by the Chief Clerk on the Commission's website, and that copies were served on all parties listed below via hand delivery, facsimile transmission, or by deposit in the United States Mail.

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