

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 27, 2015

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

**RE: COLUMBIA PACKING CO., INC.
TCEQ DOCKET NO. 2015-0987-AIR**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

DOCKET NO. 2015-0987-AIR

COLUMBIA PACKING CO., INC. § BEFORE THE
PROPOSED AIR QUALITY § TEXAS COMMISSION ON
PERMIT NO. 106009 § ENVIRONMENTAL QUALITY

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

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the hearing requests in the above-captioned matter.

I. Background

On January 23, 2014, Columbia Packing Co., Inc. ("Columbia" or "Applicant") applied to TCEQ to authorize an existing smokehouse and meat packing plant located at 2807 E. 11th St. in Dallas, Dallas County. The facilities would include two boilers and two smokehouses, and each smokehouse would have a 75-foot smokestack.

The application was declared administratively complete on February 5, 2014, and the first newspaper notice was published February 12, 2014 in the *Dallas Morning News* and February 15, 2014 in *Al Dia*. The second newspaper notice was published October 11, 2014 in the *Dallas Morning News* and October 12, 2014 in *Al Dia*. TCEQ held a public meeting November 13, 2014 in Dallas, and the public comment period closed that same date. The Executive Director's (ED) Response to Comments (RTC) was mailed May 6, 2015, and the deadline to request a contested case hearing was June 5, 2015.

State Senator Royce West, La Juana Barton, Dwaine Caraway, Myrtis Evans-Griffin, Cedar Crest Neighborhood Association, Libbie Terrell Lee, Janet Long, and Linda Preston submitted timely hearing requests. For the reasons stated herein, OPIC respectfully recommends the Commission deny all of the hearing requests.

II. Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

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. An interest common to members of the general public does

not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to 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.

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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;

- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

III. Analysis of Hearing Request

A. Whether the requestor is an affected person

State Senator Royce West

Senator Royce West states that he would like to formally contest this application. As a member of the legislature who represents the area in which the facility is located, Senator West may request a public meeting, and the TCEQ did conduct such a meeting in Dallas on November 13, 2014.¹ However, if Senator West is requesting a contested case hearing, his hearing request must be considered on an individual basis. Senator West has provided no information regarding his location and distance relative to the Columbia plant and no assertion of a personal justiciable interest. Therefore, to the extent that Senator West is requesting a hearing in his individual capacity, OPIC cannot find that he is an affected person.

La Juana Barton

La Juana Barton states that she lives in DeSoto but works in the area of the plant. She is concerned about nuisance odor and Columbia's compliance history. The intervening distance between Ms. Barton's DeSoto residence and the plant site makes it unlikely that Ms. Barton's health, safety, or use of property will be impacted by the regulated activity.² Further, without more specific information regarding where Ms.

¹ See 30 TAC § 55.154(c)(2).

² See 30 TAC § 55.203(c)(4).

Barton works and how often, OPIC cannot assess whether Columbia might impact Ms. Barton when she works in the area. Finally, the intervening distance also makes it difficult to distinguish Ms. Barton's interests from interests common to the general public.³ By rule, Ms. Barton must show that she is an "affected person" who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application and distinguish that interest from an interest common to the general public.⁴ At this time, she has not done so, and therefore, OPIC cannot find that she is an affected person in this matter.

Councilmember Dwaine Caraway

Dallas City Councilmember Dwaine Caraway states that he is totally opposed to the Columbia plant. He states that air emissions from the Columbia plant will negatively affect the health of nearby residents. However, Councilmember Caraway has provided no information regarding his location and distance relative to the Columbia plant and no assertion of a personal justiciable interest. Also, Councilmember Caraway does not state that his hearing requests are submitted on behalf of the City of Dallas. Therefore, to the extent that Councilmember Caraway is requesting a hearing in his individual capacity, OPIC cannot find that he is an affected person.

Myrtis Evans-Griffin

Myrtis Evans-Griffin states that she lives approximately 5 miles from the Columbia plant. She is concerned about nuisance odor and Columbia's compliance history. The intervening distance between Ms. Evans-Griffin's residence and the

³ See 30 TAC § 55.203(a).

⁴ *Id.*

Columbia plant diminishes the likelihood that the regulated activity will impact her health, safety, or use of property.⁵ The intervening distance also makes it difficult to distinguish her interests from those interests common to the general public.⁶ By rule, Ms. Evans-Griffin must show that she is an “affected person” who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application and distinguish that interest from an interest common to the general public.⁷ She has not done so, and therefore, OPIC cannot find that she is an affected person in this matter.

Cedar Crest Neighborhood Association / Phillip Gipson

Phillip Gipson has submitted hearing requests on behalf of the Cedar Crest Neighborhood Association (CCNA), and he states that he is the President of CCNA. Mr. Gipson and CCNA are concerned about the Applicant’s compliance history, air quality, odor, and health effects. To be considered an affected person, CCNA must show that at least one of its members would otherwise have standing to request a hearing in his or her own right, the interests CCNA seeks to protect are germane to CCNA’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members.⁸ Mr. Gipson has not provided any other member names, so to determine whether CCNA is an affected person, OPIC will assume that Mr. Gipson is the representative member.

According to the map prepared by ED staff, Mr. Gipson resides approximately 1.5 miles from the Columbia plant. The intervening distance between Mr. Gipson’s

⁵ See 30 TAC § 55.203(c)(4).

⁶ See 30 TAC § 55.203(a).

⁷ *Id.*

⁸ See 30 TAC § 55.205(a).

residence and the Columbia plant diminishes the likelihood that the regulated activity will impact his health, safety, or use of property.⁹ The intervening distance also makes it difficult to distinguish his interests from those interests common to the general public.¹⁰ OPIC cannot find that Mr. Gipson individually qualifies as an affected person, and as a result, OPIC must also find that CCNA does not qualify as an affected person. If CCNA can provide an explanation of how the association meets the requirements for a group hearing request, OPIC requests that CCNA do so.¹¹

Libbie Terrell Lee

Libbie Terrell Lee is concerned that the Applicant's plant will release air contaminants and cause odor. Using the DeSoto address provided in her hearing request, it appears that Ms. Lee resides over 10 miles from the Columbia plant. The intervening distance between Ms. Lee's residence and the Columbia plant diminishes the likelihood that the regulated activity will impact her health, safety, or use of property.¹² The intervening distance also makes it difficult to distinguish her interests from those interests common to the general public.¹³ By rule, Ms. Lee must show that she is an "affected person" who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application and distinguish that interest from an interest common to the general public.¹⁴ She has not done so, and therefore, OPIC cannot find that she is an affected person in this matter.

⁹ See 30 TAC § 55.203(c)(4).

¹⁰ See 30 TAC § 55.203(a).

¹¹ See 30 TAC § 55.205(b).

¹² See 30 TAC § 55.203(c)(4).

¹³ See 30 TAC § 55.203(a).

¹⁴ *Id.*

Janet Long

Janet Long is concerned about air quality, inadequate air dispersion modeling due to poor monitor selection and outdated data inputs, odor, health effects, and compliance history. The ED's map shows that Ms. Long resides approximately 1.5 miles from the Columbia plant. The intervening distance between Ms. Long's residence and the Columbia plant diminishes the likelihood that the regulated activity will impact her health, safety, or use of property.¹⁵ The intervening distance also makes it difficult to distinguish her interests from those interests common to the general public.¹⁶ By rule, Ms. Long must show that she is an "affected person" who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application and distinguish that interest from an interest common to the general public.¹⁷ She has not done so, and therefore, OPIC cannot find that she is an affected person in this matter.

Linda Preston

Linda Preston's hearing request lists the Golden SEEDS Foundation and Golden Gate MBC but provides no further explanation or description of this group. Ms. Preston also does not state that she represents the group. Accordingly, OPIC will consider Ms. Preston's request to be an individual hearing request and not a group hearing request. The ED's map indicates that Ms. Preston resides approximately 1.25 miles from the Columbia plant. The intervening distance between Ms. Preston's residence and the Columbia plant diminishes the likelihood that the regulated activity will impact her

¹⁵ See 30 TAC § 55.203(c)(4).

¹⁶ See 30 TAC § 55.203(a).

¹⁷ *Id.*

health, safety, or use of property.¹⁸ The intervening distance also makes it difficult to distinguish her interests from those interests common to the general public.¹⁹ By rule, Ms. Preston must show that she is an “affected person” who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application and distinguish that interest from an interest common to the general public.²⁰ She has not done so, and therefore, OPIC cannot find that she is an affected person in this matter. If the Golden SEEDS Foundation and Golden Gate MBC can provide an explanation of how the organization meets the requirements for a group hearing request, OPIC requests that it do so.²¹

B. Which issues raised in the hearing requests are disputed

All of the issues raised in the hearing requests are disputed.

C. Whether the dispute involves questions of fact or of law

All of the disputed issues involve questions of fact.

D. Whether the issues were raised during the public comment period

All of the issues were raised during the public comment period.

E. Whether the hearing requests are based on issues raised solely in a public comment which has been withdrawn

The hearing requests are not based on issues raised solely in a public comment which has been withdrawn.

¹⁸ See 30 TAC § 55.203(c)(4).

¹⁹ See 30 TAC § 55.203(a).

²⁰ *Id.*

²¹ See 30 TAC § 55.205(b).

F. Whether the issues are relevant and material to the decision on the application

Air Quality

Requestors have raised the issue of air quality. Under the Texas Clean Air Act, the Commission may issue this permit only if it finds no indication that the emissions from the facility will contravene the intent of the Texas Clean Air Act, including protection of the public's health and physical property.²² Further, the purpose of the Texas Clean Air Act is to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property.²³ Therefore, air quality is an issue which is relevant and material to the Commission's decision on this application.

Health Effects

Requestors have raised the issue of health effects resulting from Applicant's emissions. The Texas Clean Air Act is intended to protect public health and general welfare.²⁴ The issue of health effects is therefore relevant and material to the Commission's decision on this application.

Compliance History

Requestors have raised the issue of Columbia's compliance history. The Commission must consider Columbia's compliance history when determining whether

²² See TEX. HEALTH & SAFETY CODE § 382.0518(b)(2).

²³ See TEX. HEALTH & SAFETY CODE § 382.002(a).

²⁴ *Id.*

to grant the application for a permit.²⁵ Columbia's compliance history is therefore relevant and material to the Commission's decision on this application.

Odor

Requestors have raised the issue of odor, and odor is a nuisance issue. By rule, Columbia is prohibited from discharging air contaminants which injure or adversely affect human health or welfare, animal life, vegetation, or property, or which interfere with the normal use and enjoyment of animal life, vegetation, or property.²⁶ Therefore, nuisance odor is an issue which is relevant and material to the Commission's decision on this application.

Air Dispersion Modeling

Requestors assert the air dispersion modeling used in this matter is inadequate due to poor monitor selection and outdated data inputs. Air dispersion modeling is the tool being used to demonstrate that Applicant's proposed emissions will comply with all applicable emission standards. The Commission may grant this permit only if it finds no indication that Applicant's emissions will contravene the intent of the Texas Clean Air Act, including protection of the public's health and physical property.²⁷ The adequacy of the modeling is therefore relevant and material to the Commission's decision in this matter.

²⁵ See TEX. WATER CODE § 5.754(i).

²⁶ See 30 TAC § 101.4.

²⁷ See TEX. HEALTH & SAFETY CODE § 382.0518(b)(2).

IV. Conclusion

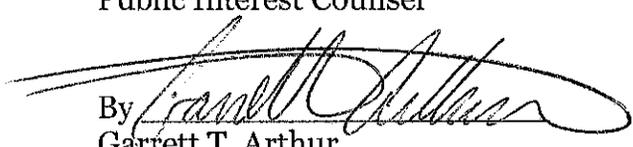
Having found that none of the requestors currently qualify as affected persons in this matter, OPIC respectfully recommends the Commission deny all of the hearing requests. OPIC does not recommend a hearing. However, if the Commission chooses to refer this case for a hearing at the State Office of Administrative Hearings (SOAH), the following relevant and material issues could appropriately be referred.

- Whether Applicant proposes and the draft permit allows emissions which will cause or contribute to a condition of air pollution?
- Whether Applicant proposes and the draft permit allows air emissions which will adversely impact health, welfare, or physical property?
- Whether Applicant's compliance history warrants denial of the application?
- Whether Applicant proposes and the draft permit allows emissions or operations which will cause nuisance odors?
- Whether Applicant performed and submitted adequate and appropriate air dispersion modeling?

If this matter is referred to SOAH, OPIC recommends a hearing duration of six months from the first day of the preliminary hearing to issuance of the proposal for decision.

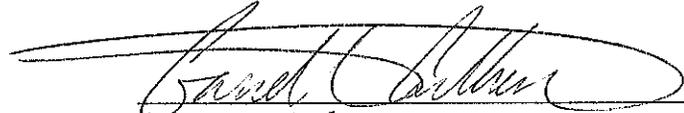
Respectfully submitted,

Vic McWherter
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2015, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.

A handwritten signature in black ink, appearing to read "Garrett T. Arthur", written over a horizontal line.

Garrett T. Arthur

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TCEQ DOCKET NO. 2015-0987-AIR

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