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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 29, 2014

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: BIG JOHN'S WOOD PRODUCTS, INC. AND
MW DAIRY FARM, LLC, DBA THE HEIFER FARM
TCEQ DOCKET NO. 2014-0958-AGR**

Dear Ms. Bohac:

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

Sincerely,



Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-0958-AGR

**IN THE MATTER
OF THE APPLICATION OF
BIG JOHN'S WOOD PRODUCTS,
INC. & MW DAIRY FARM, LLC,
D.B.A. THE HEIFER FARM,
PERMIT
WQ0005008000**

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**BEFORE THE

TEXAS COMMISSION ON

ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUEST FOR HEARING AND REQUEST FOR RECONSIDERATION**

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

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Request for Hearing and Request for Reconsideration in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

A. Background of Facility

Big John's Wood Products, Inc. and MW Dairy Farm, LLC d/b/a The Heifer Farm (Applicant) has applied to TCEQ for Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0005008000, to authorize operation of a Concentrated Animal Feed Operation (CAFO) with a maximum capacity of 1,525 head. The site had previously been a dairy facility operating under canceled TPDES Permit No. WQ0003189000 and had been permitted to allow approximately 300 head to be located at the site. The site is located at 2626 County Road 428, Stephenville, in Earth County.

B. Procedural Background

TCEQ received this application on January 28, 2013. On March 29, 2013, the Executive Director of the TCEQ (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published on April 11, 2013 in the *Stephenville Empire Tribune*. The ED completed the technical review of the application, and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published on March 7, 2014 in the *Stephenville Empire Tribune*. The public comment period ended on April 7, 2014. On June 9, 2014, the ED filed its Response to Comments (RTC). The ED issued its final decision on June 12, 2014. The deadline to request a contested case hearing or file a Request for Reconsideration was July 14, 2014.

TCEQ received timely comments and a request for a contested case hearing from Jay and Jamie Anthony (Protestants). OPIC recommends granting this hearing request.

II. APPLICABLE LAW

This application was declared administratively complete on March 29, 2013. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S.

Under the applicable statutory and regulatory requirements, a hearing 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 or 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 the application.¹

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.”² This justiciable interest does not include an interest common to the general public.³ Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.⁴ Relevant factors considered in determining whether a person is affected 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 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.⁵

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.⁶

Accordingly, responses to hearing requests must specifically address:

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

¹ 30 TEX. ADMIN. CODE (TAC) Ch. 55.201(d).

² 30 TAC Ch. 55.203(a).

³ Id.

⁴ 30 TAC Ch. 55.203(b).

⁵ 30 TAC Ch. 55.203(c).

⁶ 30 TAC Ch. 55.211(c).

- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of 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.⁷

III. DISCUSSION

A. Determination of Affected Person Status

Jay and Jamie Anthony filed timely comments and a request for a contested case hearing. The Anthonys state that they own property at 2626 CR 428, Stephenville, Texas 76401. The Anthonys state that the property is currently occupied by their daughter, Katey Anthony, and is used for rodeo training and for raising livestock. The Anthonys request a hearing to address the following concerns: 1) how the odor emanating from the site will affect their use and enjoyment of their property, 2) how the flies emanating from the site could affect their use and enjoyment of their property and the potential for them to carry illnesses that could harm livestock located on their property and 3) how the expanded facility will affect their property value, .

The Anthonys' property is immediately adjacent to the proposed site. The Anthonys raise valid concerns about the proposed facility; OPIC concludes they are entitled to a contested case hearing based on the location of their residence in relation to the site and the issues that they raise.

B. Issues Raised in the Hearing Request

The following issues have been raised in the hearing request:

⁷ 30 TAC Ch. 55.209(e).

1. Whether the proposed site will adversely affect Jay and Jamie Anthonys use and enjoyment of their property due to the presence of odor nuisance conditions;
2. Whether the proposed site will adversely affect the health of livestock on their property due to the potential for the spread of illness from large amounts of flies emanating from the proposed site.
3. Whether the proposed site will have an adverse affect on the value of the Anthonys' property.

C. Issues Raised in the Comment Period

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn.⁸

D. Disputed Issues

There is no agreement between the hearing requesters and the ED on the issues raised in the hearing requests.

E. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements.⁹ All of the issues presented 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 Chapters 55.201(d)(4) and 55.211(c)(2)(A). 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.¹⁰ Relevant and material issues are those governed by the substantive law under which this permit is to be issued.¹¹

⁸ 30 TAC Chapters 55.201(c) & (d)(4), 55.211(c)(2)(A).

⁹ 30 TAC Ch. 55.211(c)(2)(A).

¹⁰ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248–51 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the

The TCEQ is responsible for the protection of surface water quality under Chapter 26 of the Texas Water Code. Furthermore, any application for a CAFO permit must comply with Chapter 307 and 321, as well as other relevant TCEQ rules.

30 TAC § 321.43(j)(1)(A) requires CAFOs to operate “in such a manner as to prevent the creation of a nuisance”. Therefore, Issue No. 1 related to nuisance odors is relevant and material. Issue No. 2 raises relevant and material issues related to threats to livestock health and wellbeing posed by flies emanating from the proposed site. Accordingly, Issue No. 2 is appropriate for referral to SOAH. Issue No. 3 is not relevant and material because the Texas Legislature establishes the jurisdiction of TCEQ, and the Texas Legislature has not given TCEQ the authority to consider property value when considering the issuance of a permit.

G. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether the proposed site will adversely affect Jay and Jamie Anthony’s use and enjoyment of their property due to the presence of odor nuisance conditions;
2. Whether the proposed site will adversely affect the health of livestock on their property due to the potential for the spread of illness from large amounts of flies emanating from the proposed site.

H. Maximum Expected Duration of Hearing

Commission Rule 30 TAC Ch. 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

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”).

¹¹ Id.

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 TAC Ch. 55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. REQUESTS FOR RECONSIDERATION

Any person may file a request for reconsideration of the ED's decision.¹² The request must be in writing and filed with the Chief Clerk no later than thirty days after the Chief Clerk mails the ED's decision and response to comments.¹³ The request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.¹⁴

Jean Welch requested reconsideration of this application citing odor nuisance, human and livestock health, and an increased number of flies in her request for reconsideration.

OPIC recommends denying Jean Welch's requests for reconsideration. While Ms. Welch's request raises valid health, nuisance and vector concerns, these do not address specific deficiencies with the application. Further, OPIC finds that the ED's RTC addressed the issues raised, using the best available information, to the fullest extent possible. To the extent that any such request raises substantive issues affecting human health or the environment, an evidentiary hearing would be required to develop a record on such issues. Therefore, at this time, OPIC cannot recommend granting these requests for reconsideration.

¹² 30 TAC Ch. 55.201(e).

¹³ Id.

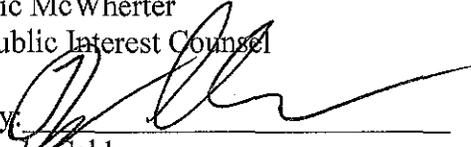
¹⁴ Id.

V. CONCLUSION

OPIC recommends granting Jay and Jamie Anthonys' hearing request. OPIC recommends referring Issues Nos. 1 and 2 referenced above in § III.G to SOAH, with a hearing duration of nine months. Furthermore, OPIC also recommends denial of Jean Welch's Request for Reconsideration.

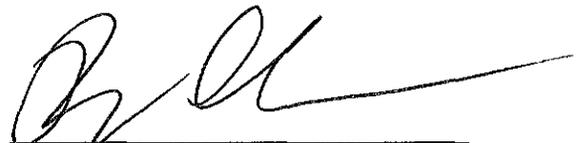
Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 
Rudy Calderon
Assistant Public Interest Counsel
State Bar No. 24047209
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
Office: (512) 239-3144
Fax: (512) 239-6377

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2014, the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was 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, electronic mail, or by deposit in the U.S. Mail.


Rudy Calderon

MAILING LIST
BIG JOHN'S WOOD PRODUCTS, INC. AND
MW DAIRY FARM, LLC, DBA THE HEIFER FARM
TCEQ DOCKET NO. 2014-0958-AGR

FOR THE APPLICANT:

Jerry Pettijohn
Big John's Wood Products, Inc. and MW
Dairy Farm, LLC, dba The Heifer Farm
P.O. Box 389
Dublin, Texas 76446-0389
Tel: (817) 443-3807

Norman Mullin
Enviro-Ag Engineering
3404 Airway Boulevard
Amarillo, Texas 79118-7741
Tel: 806/353-6123 Fax: 806/353-4132

FOR THE EXECUTIVE DIRECTOR

Hannah Wilchar, Staff Attorney
TCEQ Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606

Joy Alabi, Technical Staff
TCEQ Water Quality Division, MC- 148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-1318 Fax: 512/239-4430

Brian Christian, Director
TCEQ Environmental Assistance
Division, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE
RESOLUTION

Kyle Lucas
TCEQ Alternative Dispute Resolution,
MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:

Bridget Bohac
Texas Commission On Environmental
Quality
Office Of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311

REQUESTERS:

Jamie & Jay Anthony
Anthony Ranches LLC
P.O. Box 10
Ryan, Oklahoma 73565-0010

Jean A. Welch
3463 County Road 423
Stephenville, Texas 76401-8863