THE OHIO DEPARTMENT OF AGRICULTURE

In the matter of:

HI-Q EGG PRODUCTS, LLC

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Andrew P. Cooke
Hearing Examiner

Findings of Fact, Conclusions of Law
and Recommendation

This matter came for hearing on December 14, 15 and 16, 2010, pursuant to August 25, 2010, notice of proposed denial of application for permits. By agreement of the parties, closing arguments were submitted through post-hearing briefs and replies, and are made part of this hearing record. The Director of the Ohio Department of Agriculture was represented by Assistant Attorneys General Aaron S. Farmer and L. Scott Helkowski. Hi-Q Egg Productions, LLC, was represented by attorneys Kevin P. Braig and Timothy Hoffman.

Findings of Fact

This matter garnered widespread media attention and polarized emotional support and opposition. The facts material to this recommendation are, however, essentially undisputed. Hi-Q Egg Productions, LLC (“Hi-Q”), is seeking from the Ohio Department of Agriculture (“ODA”) permits to install and to operate a large egg production facility in York Township, Union County, Ohio. Hi-Q’s proposed facility would include a layer house, a breaking plant and a feed mill. It would initially house in excess of 820,000 egg laying hens, qualifying it as a Major Concentrated Animal Feeding Facility (“MCAFF”) under Ohio Revised Code (“R.C.”) Section 903.01(N). If issued permits, Hi-Q’s facility would create 60-80 permanent jobs in Ohio and annually purchase approximately six million bushels of locally grown corn. Hi-Q’s facility would also produce
waste materials and create substantial truck traffic along its access route.

On November 2, 2007, Hi-Q submitted an application to the ODA Livestock Environmental Permitting Program for a permit to install ("PTI") and a permit to operate ("PTO") its proposed egg production facility. The application identified the facility's access route to be located on Davis Road east to State Route ("SR") 739. York Township and Union County were properly notified of Hi-Q's application for permits, and information was exchanged regarding infrastructure improvements and cost estimates deemed necessary to accommodate the facility and the increased truck traffic on Davis Road and SR 739. On May 1, 2008, the York Township Trustees signed final recommendations on infrastructure improvements and cost estimates for Hi-Q's facility using the Davis Road entrance. The Union County Commissioners did not sign final recommendation confirmation forms for the Davis Road entrance but instead submitted the forms with an attached resolution providing final recommendations and acknowledging communication with Hi-Q. The ODA deemed the Union County Commissioner's resolution attached to the general forms sufficient to constitute final recommendations.

The ODA determined the application for the permits was complete and on November 14, 2008, issued public notice of the draft permits. On January 6, 2009, prior to completion of the permit process, counsel for Hi-Q notified the ODA that it intended to change the access route to its proposed facility from Davis Road to a location along SR 47. The change of the access route from Davis Road to SR 47 was facilitated by recommendations that Hi-Q fund over $7 million in improvements to county and township roads. Hi-Q disagreed with the final recommendations, considering them excessive and cost prohibitive.
Consistent with the permit process, Hi-Q amended its application for permits to change the access route to its facility from Davis Road to SR 47. Hi-Q properly notified the ODA, York Township and Union County of its changed access route and worked with York Township and Union County officials to obtain final recommendations for infrastructure improvements. Correspondence between Hi-Q and York Township and Union County show on-going communication regarding the necessary infrastructure improvements using the SR 47 access route but do not show agreement or final recommendations. No written statements were issued by the York Township Trustees or the Union County Commissioners certifying that, in accordance with R.C. 307.204 and R.C. 505.266, Hi-Q provided the required written notification and that final recommendations, if any, were made regarding improvements and costs of improvements.

On July 20, 2009, counsel for Hi-Q sent correspondence to the ODA acknowledging it had not received “any recommendations from the Union County Commissioners, York Township Board of Trustees, or Union County Engineer relating to roads and/or infrastructure improvements.” In response, on August 17, 2009 the ODA issued written notice to Hi-Q that as a MCAF applicant, it was required to obtain written confirmation forms from York Township and Union County.

On September 28, 2009, the ODA received its final letter from local officials relating to the Hi-Q application. The letter, from the Union County Engineer, revealed York Township and Union County continue to have concerns with the infrastructure notwithstanding the change in the access route to State Route 47. The ODA ultimately determined Hi-Q’s application for permits was incomplete for not having final recommendations from York Township and Union
County on the SR 47 access route. On August 25, 2010, the ODA issued to Hi-Q notice of proposed denial of its application for a PTI and a PTO. This matter was set for set for hearing in accordance with R.C. Chapter 119 and R.C. 903.09(F).

Conclusions of Law

Ohio law requires that Hi-Q obtain a PTI and a PTO its proposed egg production facility prior to commencing operation. R.C. 903.02(A)(2) and R.C. 903.03(A)(2). The permit process for concentrated animal feeding facilities, in this case a MCAFF, is governed by R.C. Chapter 903 and, more specifically, R.C. 903.02 Program for Issuance of Permits to Install and R.C. 903.03 Program for Issuance of Permits to Operate. Under R.C. 903.02 and R.C. 903.03, the Director of the ODA is charged with preparing programs for the issuance of permits. R.C. 903.02(A)(1) and R.C. 093.03(A)(1). R.C. 903.02(C) provides that an application for a PTI must be on a form that the Director prescribes and shall include the following information:

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(4) In the case of an application for a concentrated animal feeding facility that meets the criteria established in sections 307.204 and 505.266 of the Revised Code, written statements from the board of county commissioners of the county and the board of township trustees of the township in which the concentrated animal feeding facility would be located certifying that, in accordance with those sections, the applicant has provided the boards with the required written notification and that final recommendations were selected regarding improvements, if any, to county or township infrastructure that are needed as a result of the new or expanded concentrated animal feeding facility and the costs of those improvements; (Emphasis added).
Clarity of the relevant permit application process is found in Ohio Administrative Code ("Ohio Adm. Code") 901:10-1-02 General Administrative Requirements for Permits. Ohio Adm. Code 901:10-1-02(A)(6) restates the R.C. 903.02(C)(4) requirement that an application for a PTI must provide written statements from the board of commissioners of the county and the board of trustees of the township in which the facility will be located, certifying that the
applicant has provided the boards with the required written notification and that final recommendations, if any, regarding improvements and costs of improvements have been made by the boards.

Hi-Q’s initial application for PTI and PTO proposed access to its facility from Davis Road and SR 739. York Township and Union County were properly notified and prepared final recommendations regarding infrastructure improvements and estimated costs for access on Davis Road. Hi-Q did not agree with the recommendations and, prior to final permits being issued, amended its application to change access to its facility from Davis Road to SR 47. Notice of changed access to the facility was properly issued and exhaustive attempts were made by Hi-Q to secure final recommendations. York Township Trustees and the Union County Commissioners continued to express concerns with the infrastructure notwithstanding the change in access and re-recommended their original final recommendations. No additional final recommendations were issued by York Township or Union County regarding SR 47 access. As a result, Hi-Q’s application for a PTI is incomplete because it does not contain final recommendations regarding county or its amended application for permits to install and operate its facility with access on SR 47 is complete. This argument is not supported by the evidence. York Township and Union County actions and correspondence clearly established local officials harbored concerns about the necessary infrastructure improvements with the facility’s entrance relocated to SR 47. No evidence suggested the York Township Trustees and the Union County Commissioners submitted final recommendations regarding necessary infrastructure improvements utilizing the access route on SR 47. Counsel for Hi-Q acknowledged in a letter to the ODA on July 20, 2009, that it had not received “any recommendations from the Union County Commissioners, York
Township Board of Trustees, or Union County Engineer relating to roads and/or infrastructure improvements."

In arguing its application for a PTI and a PTO is complete, Hi-Q relies upon CECOS International, Inc. v. Shank (10th Dist. 1991), 74 Ohio App.43. In CECOS, the applicant was denied a permit to operate a hazardous waste facility after it was deemed to have submitted an incomplete application. The decision the application was incomplete was reversed by the Environmental Board of Review. The Tenth District upheld the reversal and stated the submission of a completed application should not require an applicant to guess what is required. The Court made clear an application for renewal of a permit to operate a hazardous waste facility is complete to the director's satisfaction under R.C. 3734.05(H)(1) "when all statutory and regulatory requirements, as amplified by the director, have been fulfilled." Id at 55. The holding in CECOS that a permit application is complete when all statutory and regulatory requirements have been fulfilled, supports the finding that Hi-Q's application for a PTI and a PTO is incomplete because it lacks final recommendations for infrastructure improvements from York Township and Union County, as required by R.C. 903.02(C)(4) and Ohio Adm. Code 901:10-1-02(A)(6).

Hi-Q also argued that York Township and Union County failed to comply with the permit process and violated Ohio law. These conclusions are unfounded and, if true, would not alter the conclusion Hi-Q's application is incomplete. Hi-Q's application for a PTI is governed by R.C. 903.02, which prohibits constructing a new concentrated animal feeding facility without first obtaining a permit. R.C. 903.02(A). To obtain a PTI, an applicant must submit an application that contains all the information identified in R.C. 903.02 and Ohio Adm. Code 901:10-1-02(A)(6),
including final recommendations regarding improvements, if any, to county or township infrastructure. R.C. 903.02 and Ohio Adm. Code 901:10-1-02(A)(6) do not give the ODA authority to regulate township trustees or county commissioners actions during the application process, do not impose a duty on the ODA to accept incomplete applications nor do they create a basis for an impossibility of performance argument, as set forth by Hi-Q. Regardless of local officials' actions, R.C. 903.02 and Ohio Adm. Code 901:10-1-02(A)(6) require Hi-Q's application for a PTI to contain final recommendations for infrastructure improvements from York Township and Union County. It did not. Hi-Q's application for a PTI and a PTO install is incomplete.

The granting or denial of a PTI and a PTO for concentrated animal feeding facilities is governed by R.C. 903.02, R.C. 903.02 and Ohio Adm. Code 901:10-1-02. R.C. 903.02(D) and 903.03(D) provide that the Director of the ODA may deny a PIT or a PTO, respectively, if: 1) the permit application contains misleading and false information; 2) the designs and plans fail to conform to best management practices; and 3) additional grounds established in R.C. Chapter 903 and Ohio Adm. Code Chapter 901:10. Ohio Adm. Code 901:10-1-02(A)(9) states that "a complete application is required" and subsection (d) further states "[i]f an applicant fails or refuses to correct deficiencies in the application, the permit may be denied in accordance with division (F) of section 903.09 of the Revised Code."

In this case, Hi-Q application for a PTI failed to contain final recommendations from York Township and Union County for infrastructure improvements necessary to accommodate access route on SR 47, as was required under R.C. 903.02(C)(4) and Ohio Adm. Code 901:10-1-02(A)(6). As such, Hi-Q application for permits was incomplete, Hi-Q failed to correct the
deficiency, and the director appropriately issued notice to deny its PIT and PTA pursuant to Ohio Adm. Code 901:10-1-02(A)(9) and in conformance with R.C. 903.09(F).

**Recommendation**

Hi-Q Egg Productions, LLC’s application for permits to install and to operate a large egg production facility in York Township, Union County, Ohio, failed to include final recommendations from York Township and Union County for infrastructure improvements using a proposed access route location on ST 47. Final recommendations from York Township and Union County are required by R.C. 903.02(C)(4) and Ohio Adm. Code 901:10-1-02(A)(6). It is recommended that the Director of the Ohio Department of Agriculture deny Hi-Q Egg Production, LLC’s application for a permit to install and a permit to operate because it is incomplete.

Respectfully submitted,

[Signature]

Andrew P. Cooke
Hearing Examiner

Date: 4.13.11