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TEXAS
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE
Protecting Texas by Reducing and Preventing Pollution

December 10, 2007

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

Re: Executive Director's Status Report on Elmer Jack Parks Motion to Overturn the
Executive Director's Decision and Motion to Determine the Sufficiency of Necessary
Technical Data for TPDES CAFO Permit Application WQ0003590000.

Dear Ms. Castañuela:

Enclosed for filing are the original and eleven copies of the "Executive Director's Status Report on Elmer Jack Parks Motion to Overturn the Executive Director's Decision and Motion to Determine the Sufficiency of Necessary Technical Data for TPDES CAFO Permit Application WQ0003590000." If you have any questions or comments, please call me at (512) 239-5600.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Brush".

for
Bob Brush
Staff Attorney
Environmental Law Division

Enclosure

In the Matter of the Application of §
Elmer Jack Parks d.b.a. Jack Parks §
Dairy for TPDES Permit No. §
WQ0003590000 §

Before the
Texas Commission On
Environmental Quality

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CHIEF CLERKS OFFICE

Executive Director's Status Report on Elmer Jack Parks Motion to Overturn the Executive Director's Decision and Motion to Determine the Sufficiency of Necessary Technical Data for TPDES CAFO Permit Application WQ0003590000

The Executive Director (ED) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this status report on Elmer Jack Parks Motion to Overturn the Executive Director's Decision and Motion to Determine the Sufficiency of Necessary Technical Data (Motion) of TPDES Permit Application WQ0003590000 for Elmer Jack Parks, d.b.a. Jack Parks Dairy (Parks).

I. DEVELOPMENTS REGARDING THE MOTION AND PERMIT APPLICATION SINCE THE FIRST AGENDA SETTING

At the September 19, 2007 Agenda, the Commission gave Parks 30 days to correct the deficiencies in his permit application. The Commission continued the hearing on the Motion to the November 7, 2007 agenda and directed the ED to review any information Parks may submit and to update the Commission on the status of the application.

In response to the Commission's directive, Parks submitted a new permit application on September 28, 2007. In the cover letter for that submittal, the consultant for Parks stated that the revised application addressed each of the outstanding deficiencies, but did not specifically identify how the new application accomplished that purpose.

The ED's preliminary review of the new application generated a new list of deficiencies based on changes made to previously submitted information. The submission of the new permit application package also triggered additional administrative review of the application. At the time the ED filed his status update on the Motion for the November 7, 2007 agenda on October 15, 2007, the permit application was neither administratively nor technically complete.

Subsequently, Parks addressed most of the outstanding issues in the October 15, 2007 status report prior to the November 7, 2007 agenda. However, as noted by the ED at that agenda that the application was still technically deficient and that there were still issues that needed to be addressed before the ED could draft a permit. The Commission continued the Motion to the December 19, 2007 agenda.

The ED continued to work with Parks and his consultant and has reached an agreement to resolve the one major technical deficiency. Mr. Parks and his consultant are preparing the information necessary to incorporate that solution in the technical packet. Once that information is received and can be reviewed and verified by TCEQ staff the new application packet can be declared technically sufficient and the ED could continue to process the permit application by preparing a draft permit.

Attachment A is included to summarize background information on this matter.

II. EXECUTIVE DIRECTOR'S POSITION ON THE MOTION

The ED maintains that his action in returning the application on June 20, 2007 was appropriate given Parks failure to adequately respond to the three NODs. By filing a new application, Mr. Parks demonstrated that the ED's original decision to return the original application was warranted. The return of an application under 30 TAC § 281.19(b) is an appropriate mechanism available to the ED to end the technical review of an application if an applicant fails to provide information that is essential for the ED to make a recommendation on the application. Accordingly, it is within the ED's authority to continue to recommend returning permit applications when an applicant fails to submit sufficient essential information to enable the ED to make a recommendation to either grant or deny a permit application.

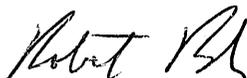
III. CONCLUSION

The issue before the Commission is whether it should overturn the ED's decision to return the application, in which case the application would be processed as a major amendment to Parks' current authorization, or uphold the ED's decision to return the application, in which case the new application would be processed as an application for a new CAFO. Processing the application as a major amendment would allow Parks to continue operating his CAFO at a number of head provided under his current authorization. Processing the application as a new CAFO would require Parks to reduce his herd size to fewer than 200 head, and operate as an AFO, until a new permit is issued.

Texas Commission on Environmental Quality

Glenn Shankle
Executive Director

Robert Martinez, Director
Environmental Law Division

by  _____

Robert D. Brush, Staff Attorney
Environmental Law Division
State Bar No. 00788772

ATTACHMENT A

1. TCEQ CAFO PERMITTING

TCEQ rules require a water quality authorization for livestock or poultry operations that confine or stable animals for a total of 45 days or more within a 12-month period and the confinement areas do not sustain crops, vegetation, forage growth, or post-harvest residues in the normal growing season. See 30 TAC § 321.32(3). An Animal Feeding Operation (AFO) becomes a Concentrated Animal Feeding Operation (CAFO) when a certain number of animals are confined. A dairy becomes a CAFO when it confines 200 milking head. Additionally, there are special requirements in 30 TAC § 321.42 for dairies located in a major sole-source impairment zone, including the requirement of obtaining an individual CAFO permit. Currently, dairies in the Bosque River watershed are the only dairies that must obtain an individual permit under § 321.42, though there are other dairy CAFOs that have individual permits for other reasons. However, dairies in other parts of the state are typically regulated under the CAFO general permit.

A typical dairy CAFO will confine its milking cows in pens and milk them two to three times daily. The waste from the cows is collected in retention control structures (RCS). Discharges from permitted dairies in the Bosque are not allowed from RCSs, unless there is a rainfall event that exceeds a 25-year, 10-day event.¹ If such an event occurs, CAFO permits authorize a discharge of waste from RCSs, if necessary. However, if a permittee does not properly maintain or operate its RCSs and an overflow occurs due to *any* size rainfall event, the discharge is considered unauthorized and would subject a permittee to TCEQ enforcement action.

CAFOs may also land apply waste on land management units (LMUs) or on third party fields if certain requirements are met. One of those requirements is that the waste is applied at agronomic rates. Run-off from LMUs or third party fields where the waste has been properly applied at agronomic rates is considered agricultural storm water run-off by the Clean Water Act. 33 U.S.C. § 1362(14). Agricultural storm water run-off is considered a non-point source that is not regulated under the Clean Water Act. However, if waste is not applied at agronomic rates or certain application practices are not followed, then run-off from LMUs and third party fields do not meet the agricultural exemption under the Clean Water Act and are considered point source discharges. In those circumstances, discharges from LMUs or third party fields would be treated as unauthorized discharges and be subject to TCEQ enforcement action.

In order to draft a permit, the ED requires sufficient technical information from an applicant. The application must include information regarding the acreage of LMUs, area of pens, and the location of water in the state, in addition to other pertinent information. This information is necessary in order for the ED to determine whether the size of the RCS structures is adequate. This information provides the basic foundation to perform an evaluation of other parts of the application,

¹ This provision is part of the new CAFO rules, approved in July, 2004. This size RCS only applies to CAFOs in major sole-source impairment zones. The size rainfall event that meets the threshold at this location is 11.9 inches. Other CAFOs are required to size their ponds for a 25-year, 24-hour rain event. A 25-year, 10-day rain event is approximately 60% more than a 25-year, 24-hour rain event.

such as the nutrient management plan. Without technically complete and consistent information throughout the application, the ED cannot make a recommendation on whether a permit should be issued.

2. HISTORY OF PARKS' APPLICATION PRIOR TO THE APPLICATION BEING RETURNED BY THE ED

Parks CAFO permit application was determined to be administratively complete on September 21, 2004. During technical review, the ED found that the information submitted in the application was insufficient. Subsequently, ED staff met with the consultant for Parks on December 16, 2005 in an attempt to resolve the technical deficiencies. On March 14, 2006, ED staff sent Parks a notice of deficiency (NOD) summarizing what needed to be included in an updated technical packet and requesting the revised technical information within 30 days. The deadline came and went with no response. On October 27, 2006, ED staff sent another NOD to Parks, which stated that he missed the deadline without responding. The ED warned him that under the authority of 30 TAC § 281.19(b), the ED would return the application if the complete and accurate information was not received within 30 days.

In response to the October 27, 2006 NOD, Parks submitted updated technical information on November 27, 2006. ED staff again reviewed this information and again concluded there were major deficiencies. On December 4, 2006, ED staff sent yet another NOD to Parks outlining the deficiencies and warning Parks that the application would be returned under § 281.19(b) if complete and accurate information was not received in 30 days. In response to this NOD, Parks submitted additional information on January 2, 2007. ED staff reviewed this information and again concluded there were major deficiencies with the response. On March 28, 2007, ED staff sent its last NOD letter to Parks outlining the remaining issues with the application and giving Parks yet another opportunity to correct the deficiencies or the application would be returned under § 281.19(b).

In response to the March 28, 2007 NOD, Parks again submitted more information on April 11, 2007, and the ED staff determined that there were still unresolved deficiencies. After three NODs and many phone conversations and meetings in excess of two years, Parks was unable to provide the ED with a technically complete application.

In each NOD, the ED informed Parks that the application would be returned under 30 TAC § 281.19(b). At no time did Parks ever disagree with the ED or seek to have the issue determined by the commission under § 281.19(b). Finally, after repeated attempts to obtain accurate and complete information to process the permit application failed, the ED decided to return the application. Subsequent to the decision by the ED to return the application, but prior to the actual return, Parks submitted additional information on June 12 and June 14, 2007. A subsequent review of the June 12th and 14th information determined that this late filed information did not resolve the March 28, 2007 NOD. The ED returned the permit application on June 20, 2007.

3. THE MOTION TO DETERMINE TECHNICAL SUFFICIENCY

After the return of the application by the ED, Parks filed this Motion under 30 TAC §

281.19(b) to have the Commission, rather than the ED, make a determination regarding the technical sufficiency of his permit application. At that same approximate time, the Applicant filed a civil action in Travis County District Court for a temporary restraining order requesting that his herd size not be reduced prior to a Commission decision on the Motion.

Parks argued in the Motion that the ED prematurely denied his right to a determination of the sufficiency of the necessary technical data. Parks cited 30 TAC § 281.19(b), which allows an applicant the option of having this question referred to the commission for a decision "instead of having the application returned."

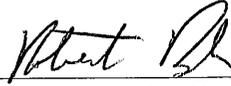
Pursuant to 30 TAC § 281.19(a), the technical review period begins with the completion of the initial review period and continues for a period of time not to exceed 75 working days. However, if the ED finds deficiencies in the application, requests information from the applicant, and then receives the information from the applicant within the prescribed time period, the ED will complete processing of the application within the technical review period extended by the number of days required for the additional data. Generously assuming that the technical review period started the day the first NOD was sent to Parks on December 16, 2005, the technical review period for Parks should have ended in early April, 2006. Nevertheless, for another full year ED staff continued to work with Parks attempting to get the information necessary to prepare a draft permit. After at least two years, this effort was not successful.

A plain reading of the § 281.19(b) indicates an applicant must ask for this referral before the return of the application. If the application has been returned the option no longer exists for an applicant to do something "instead of having the application returned." Parks was told that the ED would return the application under § 281.19(b) and Parks missed his opportunity to request a Commission hearing on the technical sufficiency of his application before the application was returned.

The ED sent three NODs to Parks after failing to obtain the complete and accurate technical information necessary to properly review the permit application. The NODs were dated October 27, 2006, December 4, 2006, and March 28, 2007. Each of those letters put Parks on notice his application was subject to return and referred him to 30 TAC § 281.19(b). Parks argued that the ED and other members of the TCEQ charged with the technical review of the permit application "should have provided Parks with sufficient opportunity to exercise this option" prior to his application being returned. The ED informed Parks that he was considering return of the application under § 281.19(b) and cited Parks to this rule at least three times. The rule states that: "The petitioner has the option of having the question of sufficiency of necessary technical data referred to the commission for a decision instead of having the application returned." Parks was on notice from the NOD dated October 27, 2006 that his application was subject to return. From October 27, 2006, Parks had over seven months to request a hearing regarding the sufficiency of his technical information prior to having his permit application returned and he did not do so.

CERTIFICATE OF SERVICE

I certify that on December 10, 2007, the original and 11 copies of the Executive Director's Status Report on the Motion to Have the Commission Determine the Technical Sufficiency of TPDES Permit Application WQ0003590000 was filed with the TCEQ's Office of the Chief Clerk, and mailed or faxed to all persons on the attached mailing list.



Robert D. Brush, Staff Attorney
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State Bar No. 00788772

CHIEF CLERKS OFFICE

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Elmer Jack Parks d.b.a. Parks Dairy
TCEQ Docket No. 2007-1128-IWD

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