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2008 JAN 22 PM 4: 34

CHIEF CLERKS OFFICE

January 22, 2008

Ms. LaDonna Castañuela
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC 105
P.O. Box 13087
Austin, Texas 78711

Via hand-delivery

**Re: Application by Hidden View Dairy for TPDES Permit No. WQ03197.
TCEQ Docket No. 2007-0831-AGR, SOAH Docket No. 582-08-0007**

Dear Ms. Castañuela,

Please find enclosed for filing an original and eleven copies of the **Brief of Sierra Club and Dr. Pritchey Smith Regarding Certified Questions** in the above-referenced matter.

If you have any questions please call.

Sincerely,



Eric Allmon

Enclosures

cc: Service List

SOAH DOCKET NO. 582-08-0007
TCEQ DOCKET NO. 2007-0831-AGR

2008 JAN 22 PM 4: 34

IN THE MATTER OF THE
APPLICATION OF HIDDEN VIEW
DAIRY FOR TCEQ WATER QUALITY
PERMIT NO. 03197

§
§
§
§

BEFORE THE TEXAS
COMMISSION ON CHIEF CLERKS OFFICE
ENVIRONMENTAL QUALITY

**BRIEF OF SIERRA CLUB AND DR. PRITCHY SMITH REGARDING
CERTIFIED QUESTIONS**

TO THE HONORABLE COMMISSIONERS:

Comes now the Sierra Club (the "Club") as well as Dr. Pritchly Smith, (collectively "Protestants") and file this, their Brief Regarding Certified Questions. Protestants would respectfully show the following:

I. INTRODUCTION

Certified questions present the Commission with an opportunity to provide guidance on issues of law or policy that go beyond the facts of any particular case. Thus, the proper focus for the Commission's decision on any certified question is the applicable statutes, regulations, and Commission policy. Protestants are convinced that a consideration of the questions presented under the applicable law and policy will result in a decision supporting Protestants' party status, and the continuation of the hearing.

In this case, however, Hidden View Dairy ("Applicant") has chosen to consistently misrepresent the factual background in this case, and factually mislead the Commission. For this reason, Protestants feel compelled to correct many of the most egregious factual misrepresentations made by Applicant:

- (1) The Club has in no way attempted to prevent a timely examination of Ms. Carol Robbins' landowner status. Applicant certified under oath that Ms. Carol Robbins is an adjacent landowner in its initial application, a position it did not reverse until after the final deadline for briefs prior to the Commission's consideration of the Club's hearing request. At the time of Mr.

Kramer's affidavit that a member (Ms. Robbins) was an adjacent landowner, Applicant had presented the Commission with a signed affidavit of its own to the exact same fact.¹ The Club presumed that Applicant had researched its position that Ms. Carol Robbins is an adjacent landowner prior to presenting that position to the Commission. It is important to recognize that Applicant is violently attacking the Club for agreeing in good faith with Applicant's own position at that time.

- (2) Ms. Carol Robbins reasonably feared retribution at the release of her name, and the Sierra Club initially withheld her name for this reason alone. In fact, to show the strength of its case, the Club would have preferred to release Ms. Carol Robbins' name earlier. Each time the issue was raised by any party, the Club's counsel directly asked Carol Robbins for permission to release her name. She denied permission to the Club each time until the information was specifically requested in agency responses to the hearing request. Ms. Carol Robbins has consistently maintained this fear under subsequent deposition, based on her fears for the safety of her mother. Having grown up in the area, maintained frequent visits and contact with the area for over 40 years, and being the owner of the property at issue as a remainderman owner, and other nearby property in fee simple, Carol Robbins is aware of specific instances where persons choosing to protest TCEQ dairy permits have been the subject of retribution such as the shooting of their livestock.
- (3) The delineation of specific association members in an association's reply to hearing request responses, as was done in this case, does not reflect bad faith on the part of the requester. As the Commission can confirm with either the Office of the Public Interest Counsel ("OPIC") or the Executive Director's ("ED") office, the opportunity for such clarification is not only the norm, but is also explicitly allowed for by rule, and such supplementation in a reply is hardly uncommon. Applicant may take issue with the process the Legislature and TCEQ have established, but it would be incongruous with long-standing TCEQ practice to conclude that the Sierra Club somehow acted in bad faith when it availed itself of opportunities provided in that process in the same fashion as innumerable other associations have previously done.
- (4) As an art curator, Ms. Robbins testified at deposition regarding issues of ownership subject to the stipulation that she was not offering a legal opinion. She has consistently contended that she holds a legal interest in adjacent property, even if she has not always been positive of how that interest would be legally described.

As for Applicant's claims of a superior operation, Protestants will further note that the testimony of Derek Smith confirmed that Greens Creek after flowing through the Dairy

¹ Attachment A to this brief.

now exhibits “a tremendous amount of growth,” and that he and his family are no longer able to swim in the creek on their regular visits to the property as they used to because of contamination of the Creek.² Parc Smith confirmed this testimony, and testified to his own observance of waste dispersment activities occurring on the dairy, and the potential for runoff from the dairy to run downstream onto his father’s property that he, his brother, and their families regularly visit.³

II. FIRST QUESTION CERTIFIED BY ALJ

A. The Question

The administrative law judge (“ALJ”) first recommends certification of the question requested by Protestants:

Is the owner of a vested remainderman interest in property adjacent to a concentrated animal feeding operation an affected person with respect to an application for a new or amended individual permit for that facility?

B. The Affected Person Standard

1. Person Must have “Justiciable Interest”

The answer to this question is governed by the application of Texas Water Code § 5.115, and 30 TAC § 55.203. At the core of both this statute and regulation is the question of whether a person holds a “justiciable interest” related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. A justiciable interest is a particular personal interest which separates a person from the general public.⁴ While property ownership is often treated as the most obvious justiciable interest, the courts have made clear that a justiciable interest can involve a wide variety of interests, noting in a case involving a predecessor to the TCEQ that, “An

² Transcript of Nov. 8, 2007 preliminary hearing, p. 92, l. 13-21 (Attachment B to this Brief).

³ Transcript of Nov. 8, 2007 preliminary hearing, p. 112-113 (Attachment B to this Brief).

⁴ *Hunt v. Bass*, 664 S.W.2d 323 (Tex. 1984).

injury need not affect 'vested' property rights to confer standing; the harm may be economic, recreational, or environmental."⁵ The injury asserted need simply be something that distinguishes the interests of the person seeking standing from the interests of the general public.⁶

2. Justiciable Interest Exists if Potential Impact is Shown

Furthermore, the question of whether a person is affected turns on whether there is a *potential* for future impacts. Applicants have tried to confuse the issue by attempting to force someone to either show they are already impacted, or that there is a certainty of impact. Both approaches are wrong, and TCEQ decisions based on these approaches have been rejected by the courts. Actually determining the full extent of future impacts is a question for the hearing itself; determining if a potential exists for future impacts is the relevant question in deciding whether someone is "affected."⁷

3. Associational Standing Test

⁵ *Texas River Protection Association v. Texas Natural Resource Conservation Commission* (TNRCC), 910 S.W.2d 147 (Tex. App. – Austin, 1995) *writ denied*.

⁶ *Id* at 151.

⁷ *TNRCC v. Grissom*, 17 S.W.3d 797, 803 (Tex. App. – Austin, 2000) *pet. dismiss'd*:

United Copper confuses the preliminary question of whether an individual has standing as an affected person to *request* a contested-case hearing with the ultimate question of whether that person will *prevail* in a contested-case hearing on the merits. In essence, United Copper suggests that Grissom should be required to prove that he will *prevail* in a contested-case hearing just to show that he has the standing necessary to *request* such a hearing. We reject this argument here just as we did in *Heat Energy*. See 962 S.W.2d at 295. [emphasis in original]

Heat Energy Advanced Technology, TNRCC v. West Dallas Coalition for Environmental Justice, 962 S.W.2d 288, 295 (Tex. App. – Austin, 1998) *pet. denied*:

The Commission clearly derived its rule on associational standing from the standard Texas courts apply in analogous circumstances. See *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993) (setting forth standard for associational standing in court proceedings; standard matches Commission rule almost verbatim). This standard does not require parties to show they will ultimately prevail in their lawsuits; it requires them to show only that they will potentially suffer harm or have a "justiciable interest" related to the proceedings. See *Tex. Water Code Ann. § 5.115(a)*; see also *Texas Rivers Protection Ass'n v. Texas Natural Resource Conservation Comm'n*, 910 S.W.2d 147, 151, 152 n.2 (Tex. App. – Austin 1995, *writ denied*).

An association has standing if (1) the purpose of participation is consistent with the purpose of the organization; (2) the participation of an individual member is not needed (such as the evaluation of individual money damages in a tort suit); and (3) any particular member would have justiciable interest in the application.⁸ Because TCEQ permit hearings involve prospective decisions focused on whether a draft permit would meet the requirements of applicable law if issued, the second prong is never an issue in TCEQ permitting proceedings. The certified question at issue deals with the third prong of this test: whether the Sierra Club has a member with a justiciable interest.

C. Nature of Remainderman Interest

The consideration of whether Carol Robbins is an affected person raises a question regarding the significance of the property interest held by someone who owns a property subject only to the life estate currently held by someone else. The Club, and Carol Robbins, contend that her regular visits to adjacent property render her affected due to impacts upon her recreational and aesthetic interests, but those interests are not at issue in the consideration of the certified question.

A vested remainderman interest is not contingent on any future event. Such a person owns a definite interest in the property. In this case, the probated will of Ben E. Robbins, who is already deceased, grants Betty Robbins only a life estate in the property. Betty Robbins does not have the power to sell or dispose of the property in any manner that would destroy Carol Robbins' interest. In fact, ownership of what was initially Ben E. Robbins share of the property most accurately rests in the hands of Carol Robbins (indivisibly shared with Judith Robbins):

⁸ 30 TAC § 55.205; *Texas Association of Business v. Texas Air Control Board and Texas Water Commission*, 852 S.W.2d 440 (Tex. 1993).

[T]hough a life tenant is entitled to exclusive possession and control of the corpus of the property, he owns nothing more than the revenue or income produced from the corpus during the tenancy. *The corpus belongs to another, be it a remainderman or one who holds a reversionary interest.*⁹
[emphasis added]

Under Texas law, the holder of a life estate simply has been granted the right to use the property, not a right of ownership. The remainderman is the true owner of the property itself.

D. Remainderman Interest as Basis for Affected Person Status

As noted, the question of whether a person is affected turns on whether they are potentially impacted in a manner differentiable from the general public. A confined animal feeding operation may affect adjacent property in several fashions that taken together have the potential to impact virtually any use of the property. Odors from the facility can impact the ability to use that property for outdoor activities. Movement of contaminants into groundwater due to excessive waste application limits in a permit may affect the ability to use water beneath the adjacent property for purposes including domestic and livestock uses. Runoff may enter adjacent properties if the control requirements of the permit are not adequate. The spray application of waste may result in the deposit of waste on adjacent land or structures upon the land if the required buffer zones are inadequate, especially when wind impacts the spray.

The question boils down to this: Is the holder of a vested remainderman interest potentially impacted by an application in a manner distinguishable from the general public? The general public does not hold an asset whose value depends on the result of

⁹ *Taylor v. Taylor*, 1997 Tex. App. LEXIS 3774 (Tex. App. – Amarillo, 1997)(Not designated for publication). *no writ*. Citations omitted.

the permitting decision. The general public does not hold a right to future use of specific property that will clearly be impacted if the permit under consideration is not adequate.

Just as any other adjacent landowner, the holder of a vested remainderman interest in property adjacent to a confined animal feeding operation is affected in a manner distinguishable from the way in which the general public would be affected by the same facility. Thus, such a person is properly considered an affected person, and the Commission should answer the first certified question "Yes." This answer would render the other questions referred by the ALJ moot, and Protestants would agree with the ALJ that it is not necessary for the Commission to reach those questions depending on the determination of this first question. Even so, the other questions presented by the ALJ present the Commission an opportunity to affirm well-established law and policy.

II. SECOND AND THIRD QUESTIONS CERTIFIED BY THE ALJ

A. Questions

If the Commission answers the first question "no," the ALJ seeks an answer to the following questions:

When the Commission refers a case to SOAH solely based on a hearing request filed by an association, and the Commission indicates in its Interim Order that the referral to SOAH is based on a single named member, and thereafter SOAH determines that the named member is, in fact, not actually an "affected person," may that association then rely upon the interests of a newly solicited member (i.e., a person solicited to join the association only after the referral to SOAH) for purpose of conferring standing on the association?

May a person gain party status at a preliminary hearing in a contested case when the sole hearing request that gave rise to the preliminary hearing was determined not to be made by an affected person?

To avoid repetitive briefing, Protestants believe that these questions may be considered jointly because both questions turn on the established role of the ALJ

at the preliminary hearing in independently determining the parties to a proceeding based the circumstances of the parties seeking status at the time of the preliminary hearing.

B. Role of Preliminary Hearing in Permitting Process

1. The ALJ Makes a Fresh Determination of the Parties

While the ALJ has referred the issues above as separate questions, both questions turn on the role of the preliminary hearing and the ability of the administrative law judge to make a fresh determination of the persons who should be admitted as parties to the proceeding. The types of proceedings affected by these questions include not only water quality permits, but also other types of permits including solid waste permits and air quality permits. While the process can initially seem complex, or even counter-intuitive, it is important to recognize that the issue presented has been repeatedly and consistently addressed by the TCEQ and its predecessor agencies. While the facts of every case may be different, the legal principles determining the answer to these questions are well-settled.

2. Admitting Any Affected Person at the Preliminary Hearing, Regardless of Prior Participation, Is Long-Standing Texas Law

The designation of parties at the preliminary hearing based on who appears at the preliminary hearing, and the status of the parties at that point in time, pre-dates the House Bill 801 process established in 1999. It has always been the role of the administrative law judge to consider who the parties should be based on who appears at the preliminary hearing, and the current status of each party at that time. For many reasons entirely unrelated to whether a permit is protested, the permitting process can move

excruciatingly slow, and the period from the end of the comment period to the commencement of the SOAH hearing can be long.

It has always been recognized that this delay is especially significant for associations, since the membership of associations is not static. Because of the delay, associations have never been required to rely on the same persons at the time of the preliminary hearing as were relied upon during the comment period. If that were the case, it would be impossible for an association to maintain standing if the member cited during the comment period was deceased before the preliminary hearing, even if the association had "new" members who would clearly be affected. This cannot reasonably be contended to be the case, but answering "no" to the second question presented would require just such a result.

3. The Legislature Requires Admission of All Affected Persons at the Preliminary Hearing to Conserve Judicial Resources and Preserve Federal Delegation

Admitting all persons as parties who seek status at the time of the preliminary hearing and can show themselves legally "affected" is also a result of Texas' approach to judicial appeals of TCEQ actions. Anyone affected by a decision at the time it is finally made is entitled to judicial review of that decision. Standing in court would not depend on a person's participation during prior stages, such as the comment process. If Texas did not allow these persons the opportunity for a hearing at the agency level wherein they could present evidence, then they would be entitled to present evidence at the judicial level. In order to conserve judicial resources, and limit agency appeals to substantial evidence reviews, the Texas Legislature has established a system requiring that all persons who can show themselves affected at the time of the hearing be admitted to the

proceeding. Partly for this reason, SOAH has never treated the appearance and status of the person whose request necessitated a hearing as a prerequisite for the commencement of the evidentiary hearing.

Furthermore, the opportunity for any affected person to participate in a hearing on a water quality application is a component of Texas' delegation to administer the National Pollution Discharge Elimination System (NPDES) program within the state of Texas. During the process of obtaining delegation, Texas assured the Environmental Protection Agency that all affected persons would be provided the opportunity to participate in a hearing on a water quality permit application if a hearing was held. TCEQ must maintain this opportunity as one of the elements of its delegated NPDES program. To answer "No" to either the second or third certified questions would violate the conditions of Texas' delegation to administer the NPDES program.

4. The Ability of the Commission to Limit the Issues Considered by SOAH Addresses Any Alleged Unfair Surprise Resulting from the Participation of New Parties at SOAH

In passing House Bill 801, the Legislature sought to address concerns raised by industry advocates regarding the ability of persons to join the process at the preliminary hearing. House Bill 801 empowered the Commission to limit the issues considered at the SOAH hearing to only those raised during the comment period. Thus, no matter who appeared at the preliminary hearing, an Applicant cannot claim that it is surprised by the *issues* it is required to address in that hearing. Applicants such as Hidden View Dairy are not prejudiced by the ability of new persons, such as Dr. Smith, to participate in the permitting process at the time of the preliminary hearing because those persons cannot

force the Applicant to address any issue that it has not been provided notice of during the comment period.¹⁰

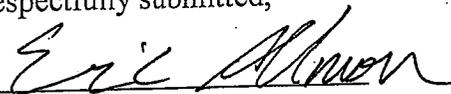
5. A Member's Reason for Joining is Irrelevant

Applicant repeatedly implies that the solicitation of a member by an association reduces the significance of that member. Under Texas law, it does not matter when, how or why a person joined an association as a member, so long as they are a member at the time of the preliminary hearing. In this case, it can hardly be termed inappropriate for Sierra Club staff to contact persons in the area of the proposed expansion to ensure that they knew of the state of the permitting process when this only achieves what the TCEQ-required notice process is also intended to achieve. Given the Smith family's frequent visits to their property, and Dr. Smith's plans to retire on the property, it is also hardly surprising that the entire Smith family would join the Club upon learning that the Club shared their concern for the impacts of the existing and proposed facility.

III. PRAYER

FOR THE REASONS SET FORTH ABOVE, Protestants respectfully pray that the Commission answer "Yes" to each of the questions certified to the Commission by the ALJ.

Respectfully submitted,

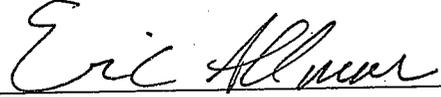


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ATTORNEY FOR PROTESTANTS

¹⁰ Protestant's will note that an ALJ has the rarely-exercised discretion to add an issue for consideration during the hearing for good cause shown.

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that the foregoing was served to all parties listed below via facsimile transmission and first-class mail to the same on the 22nd of January, 2008.



Eric Allmon

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For the State Office of Administrative Hearings:

Via facsimile only

ALJ Roy Scudday
State Office of Administrative Hearings
300 West 15th St, Suite 502
Austin, Texas 78701
(512) 475-4993

Attachment A

LaDonna Cesteruela OCT 02 2007
 LaDonna Cesteruela, Chief Clerk
 Texas Commission on Environmental Quality

SECTION 2 ADJACENT LANDOWNERS INFORMATION

Table 2.1, entitled Adjacent Landowners List, identifies the adjacent landowners within 500 ft of the facility and any wastewater application areas owned and/or operated as part of the facility. The table corresponds to the properties identified in Figure 2.1 Adjacent Landowners Map. The base map and Geo ID numbers were provided by the Erath County Appraisal District. Landowner addresses and legal descriptions were obtained from the Erath County Appraisal District web database (current as of 10/10/2005).

Table 2.1: Adjacent Landowners List

Tract	Landowner Address	Geo ID/Legal Description	Acres
A	Betty E Robbins (3/4 undivided interest) Carol J Robbins (1/8 undivided interest) Judith J Robbins (1/8 undivided interest) 1011 CR 520 Dublin TX 76446	R.0242.00060	251
B	Norman and Marjorie Massey Estate c/o Marjorie Massey POA PO Box 1495 Stephenville TX 76401-0015	R.0391.00050	172.76
C	VLB c/o Whitehead 700150277 c/o Carl T and Lynne Whitehead 2316 CR 277 Dublin TX 76446	R.0590.00060	40
D	Robert Wayne Caudle 450 Hancock CT Fort Worth TX 76108	R.0590.00020	218.21
E	Pritchey Smith 233 Orange St. Neptune Beach FL 32233	R.0450.00100 R.0450.00100	505.886 1.0
F	Pam Alexander Allen 2158 CR 521 Dublin TX 76446	R.0450.00010 R.0494.00020	19.55 95.678
G	Francis B Stephen 4610 29th St Lubbock TX 79410	R.0160.00050	68.16
H	Suzanne G and Roger Nelson Mogonye PO Box 132 Elgin TX 78621	R.0160.00060	194.71
I	*The appraisal district could not determine the ownership of this tract of land.	T.0095.00020 Please see attached affidavit.	1.52

3. Certification

Permit No. 03197

I, William N. DeJong, General Partner, Hidden View Dairy
(Print or Type Name) (Title)

certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

I further certify that I am authorized under 30 Texas Administrative Code §305.44 to sign this document and can provide documentation in proof of such authorization upon request.

Signature: *William N. DeJong* Date: 4-14-06

Received

APR 20 2006

Water Permitting
Application Team

THE STATE OF TEXAS
COUNTY OF TRAVIS

I hereby certify that this is a true and correct copy of a Texas Commission on Environmental Quality document, which is filed in the permanent records of the Commission. Given under my hand and the seal of office on

LaDonna Castanuela OCT 02 2007

LaDonna Castanuela, Chief Clerk
Texas Commission on Environmental Quality

Attachment B

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
STATE OFFICE OF ADMINISTRATIVE HEARINGS
(TEXAS COMMISSION ON ENVIRONMENTAL QUALITY)
AUSTIN, TEXAS

APPLICATION BY HIDDEN)
VIEW DIARY, A TEXAS GENERAL) SOAH DOCKET NO.
PARTNERSHIP, D/B/A HIDDEN) 582-08-0007
VIEW DAIRY, ERATH COUNTY,) TCEQ DOCKET NO.
TEXAS, FOR TPDES) 2007-0831-AGR
PERMIT NO. WS0003197000)

PREHEARING CONFERENCE

THURSDAY, NOVEMBER 8, 2007

BE IT REMEMBERED THAT at 10:08 a.m., on Thursday, the 8th day of November 2007, the above-entitled matter came on for hearing at the State Office of Administrative Hearings, William P. Clements, Jr., Building, 300 West 15th Street, Room 407D, Austin, Texas 78701 before ROY SCUDDAY, Administrative Law Judge, and the following proceedings were reported by Evelyn Coder, a Certified Shorthand Reporter of:

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CHIEF CLERKS OFFICE

2007 NOV 15 PM 4:44

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

12:10 1 are in fact owned by Pritchey Smith.

2 MR. BRADBURY: We have no objection to
3 that document, Your Honor.

4 MR. ALLMON: We would offer that as
12:10 5 Sierra Club -- I don't know what the next number was.

6 JUDGE SCUDDAY: 3.

7 MR. ALLMON: Yeah, Sierra Club 3, the
8 abstract.

9 And I've also passed out certified
12:10 10 copies of the payment records for the taxes at that
11 property. We would offer that as Sierra Club 4.

12 MR. BRADBURY: No objection, Your Honor.

13 JUDGE SCUDDAY: Admitted.

14 (SC Exhibit Nos. 3 and 4 marked and
12:11 15 admitted)

16 DIRECT EXAMINATION

17 BY MR. ALLMON:

18 Q And I've also placed in front of you, Derek,
19 a document, adjacent landowners' information with an
12:11 20 attached map. Do you see that, Derek?

21 A (Indicating yes.)

22 Q If you could say "yes" or "no" so the court
23 reporter can --

24 A Yes.

12:11 25 Q Which property is -- belongs to Pritchey Smith

12:11 1 on that map? You can identify it by alphabetical
2 letter.

3 A Yes. It's E.

4 Q And is that property upstream or downstream
12:11 5 from the dairy?

6 A It's downstream.

7 Q Do you visit that property yourself?

8 A Yes, often.

9 Q Have you observed Greens Creek in that area?

12:11 10 A Yes.

11 Q Could you please describe Greens Creek in
12 your recent visits to the property?

13 A Yes. There's a tremendous amount of growth
14 within the creek, within the water, that has never
12:12 15 been there. I grew up swimming in that creek as a
16 child. We spent most weekends there growing up. My
17 grandfather -- it's my grandfather's/grandmother's
18 place. Father was born and raised there.

19 We were there a lot and still go and
12:12 20 camp with our children, but the creek, you can no
21 longer swim in it anymore. I don't have my kids get
22 in it because of -- it's just absolutely changed over
23 the last, oh, ten, eleven years.

24 Q When you say "growth," what type of growth
12:12 25 are you describing?

12:12 1 A Green mossy growth throughout the creek. The
2 water clarity is different. At times, it will stink.
3 It smells. It smells like cow dung much of the time.

4 Q And has Pritchey Smith had plans to retire on
12:13 5 this property?

6 A Yes.

7 Q And are his plans impacted by the impacts of
8 the dairy on the property?

9 A Well, yes.

12:13 10 MR. BRADBURY: Your Honor, I'm objecting
11 to hearsay in response to these questions.

12 MR. ALLMON: I'm asking him as -- he's
13 been designated as Pritchey Smith's representative.

14 JUDGE SCUDDAY: Of your own knowledge,
12:13 15 has he --

16 A I talk with my father daily. We have always
17 planned on him retiring there, and he's looked at
18 that. We've spent multiple occasions in the last two
19 years going to the property, looking for which home
12:13 20 site -- where he was going to build or whether he was
21 going to take the house that is currently there. The
22 current plans were for him to retire on a hill that is
23 just above the creek.

24 Q (By Mr. Allmon) And so the quality of the
12:14 25 creek impacts those plans to retire on the property?

12:14 1 A Yes, absolutely.

2 Q How does -- how does the quality of the
3 creek -- so are there any concerns relative to this
4 dairy that relate to his plans for retirement on that
12:14 5 property?

6 JUDGE SCUDDAY: All right. Counsel, I
7 understand that he's the representative but as for the
8 personal opinions of Mr. Smith, I think I'm going to
9 give counsel an opportunity to take Mr. Smith -- get
12:14 10 the information from Mr. Smith directly, and I think
11 that would be better.

12 I understand the situation. I
13 understand the location of the land. I understand
14 that the creek goes through it. I understand his
12:14 15 testimony as to the creek. So I don't have any
16 problem that he may very well be an affected person
17 and qualify as such, but because it's just come up
18 today, so I'm going to give counsel an opportunity to
19 question him about that before I make a final ruling
12:15 20 on that will. So you don't need to go into great
21 depth with Mr. Smith about the problems that are
22 encountered.

23 MR. ALLMON: And I'll just ask a few
24 questions because we're relying -- the Sierra Club is
12:15 25 citing Pritchey Smith and Derek Smith and Parc Smith,

12:15 1 all three, as basis of standing.

2 JUDGE SCUDDAY: Well, okay.

3 MR. ALLMON: We can respect that the
4 Court may not agree on all three, but we are citing
12:15 5 all three.

6 JUDGE SCUDDAY: That's fine.

7 Q (By Mr. Allmon) So how often do you visit
8 the property?

9 A About once a month.

12:15 10 Q Okay. And what activities do you do on the
11 property?

12 A We camp. My grandmother also lives -- not on
13 the property, but grandmother on the other side of the
14 family lives in Dublin, and we visit her once a month,
12:15 15 and we go -- we camp on the place. We walk the creek.

16 We spend a lot of -- I have four
17 children. My brother has two. We spend a lot of time
18 walking it, talking to our children about it, helping
19 them develop a relationship with the place.

12:16 20 Q And do you have any concerns regarding the
21 impact of the dairy on your camping at the -- on that
22 property?

23 A Absolutely. There's a fly menace that's
24 indescribable. You open the cab of your truck, and
12:16 25 it's filled with flies immediately. We can't -- don't

12:16 1 want to eat out of the creek anymore, anything that we
2 catch fishing, and it's -- it's absolutely changed in
3 a short period of time, just the quality of the creek
4 itself.

12:16 5 MR. ALLMON: All right. That's all my
6 questions for this witness. We'll also be calling
7 Parc to the stand. Well, so that's all my questions
8 for this witness.

9 JUDGE SCUDDAY: Do you have any
10 questions for this witness?

11 MR. BRADBURY: I do, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. BRADBURY:

14 Q I sincerely apologize because I've forgotten
12:17 15 your name.

16 A Derek.

17 Q A few questions for you. So the record is
18 clear, neither you nor your brother have any ownership
19 interest in the property. Correct?

12:17 20 A I don't know about legally. Throughout my
21 life, the place was always to be the boys, was always
22 my grandmother's wishes. We're in my father's will as
23 the heirs of the property. I don't know how that
24 works legally but, in my opinion, yes, absolutely.

12:17 25 Q I don't want to drag you into a legal

12:31 1 property?

2 A Very similar to my brother. I go camping out
3 there. I've visited it my whole life. During high
4 school I was out there almost every weekend camping,
12:32 5 and now still visit it with my children.

6 Q And do you have any concerns regarding the
7 potential impact of the expansion of the dairy, that
8 it may have on your property and the creek that flows
9 across it?

12:32 10 A Absolutely.

11 Q And what are those concerns?

12 A That the changes I've seen in the land will
13 get worse. The flies would be worse, the sounds would
14 be worse, all of those; the quality of the creek would
12:32 15 be worse.

16 Q And what are the changes you've seen to the
17 land that you referred to?

18 A Well, the smell, the flies, the creek algae,
19 the murkiness of the water, all those.

12:33 20 Q How often do you visit the property?

21 A About once a month. Sometimes it's more,
22 sometimes it's less. On a yearly average, easily once
23 a month.

24 Q And I won't go into too many questions, but
12:33 25 are you also aware that your father has plans to

12:33 1 retire on the property?

2 A Yes.

3 Q Okay. Do you know whether the lessee on that
4 property tends to practice sustainable agricultural
12:33 5 techniques?

6 A My understanding of sustainable agricultural
7 techniques is what I witnessed that he does. He has a
8 small number of cattle on a large piece of property.
9 He's always been very good about rotating that cattle

10 around and having low impact on it, very low numbers
11 for such a large acreage.

12 Q And has that low impact been important to
13 your family?

14 A Oh, absolutely. We've felt like it was -- we
12:33 15 felt good about that he was using sustainable
16 agriculture out there, that he was -- you know, he was
17 cognizant of the land carrying capacity, and that's,
18 you know, what I would consider the opposite of what's
19 happening on the property upstream.

12:34 20 Q Have you observed the operation of the
21 property upstream, the Hidden View Dairy?

22 A Yes, I have.

23 Q Could you describe those observations?

24 A The first thing that horrified me was to
12:34 25 drive up to our property and see the 150-foot stream

12:34 1 of brown water being applied to their land. They have
2 these huge sprinkler systems that spray out brown
3 water that is aersoled at a certain point that would
4 easily migrate over to my property in any sort of
12:34 5 windy condition at all.

6 I would think a ten mile per hour wind
7 would easily take that stuff to my property. So
8 that's one of the things that I've seen over there.

9 I've seen all the trees cut down off of
12:34 10 the property when they first became this dairy, and I
11 see the -- you know, what seemed to be overfertilized
12 fields. I don't know if they're overfertilized, what
13 the application rate is, but I know that they're the
14 greenest thing around out there.

12:35 15 So I've seen those parts of the practice
16 and the many head and the lights all night and the
17 sound all night of our property -- you know, easily
18 impacting our quality of life on our side of the
19 property.

12:35 20 Q So you don't know whether they're
21 overfertilized, but you're concerned they may be?

22 A Absolutely. When you see how much water is
23 pouring out at any moment, and you know the slope of
24 that land, it seems apparent that there's no way that
12:35 25 couldn't be having an impact on the creek downstream.

12:35 1 It all flows right down there.

2 Q Have you seen the buffers between the
3 application fields and the creek on the dairy?

4 A I have seen that there are some -- maybe
12:36 5 they're swales. Some sort of terracing is, I guess,
6 what there is over there, and then I've read a little
7 bit about what these are supposed to protect, under a
8 25-year rain event, which I think is laughable,
9 because we've had more than those this year. Keeping
10 water out of the 25-year rain event is -- it's not
11 good enough for me when I see brown water in the
12 creek.

13 Q Were you here previously for the testimony of
14 Carol Robbins?

12:36 15 A Today?

16 Q Today.

17 A Yes.

18 Q Have you observed the topography on the
19 Robbins' property?

12:36 20 A I haven't observed -- I haven't been onto her
21 property.

22 Q Okay.

23 A Viewing from the maps, is what all I can do.

24 Q Okay.

12:37 25 MR. ALLMON: That's all of my questions.