

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

2008 FEB -4 PM 3:44

APPLICATION BY HIDDEN  
VIEW DAIRY, A TEXAS GENERAL  
PARTNERSHIP, D/B/A HIDDEN VIEW  
DAIRY ERATH COUNTY, TEXAS  
FOR TPDES PERMIT NO.  
WQ0003197000

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BEFORE THE CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

APPLICANT'S REPLY BRIEF REGARDING CERTIFIED QUESTIONS

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

COMES NOW, Hidden View Dairy, Applicant herein, and files this Reply Brief Regarding Certified Questions, and in support thereof shows the following:

I. REPLY

**A. The Facts Before the Commissioners on August 22, 2007 Were Not the True Facts Now Revealed in Sworn Testimony.**

As a threshold matter, the Sierra Club attempts to recast the record regarding the factual misrepresentations in this case. The Commission, however, need look no further than at the record. The Sierra Club represented the following facts to the Commissioners in its hearing request and reply:

- 1) Carol Robbins owned property adjacent to the Dairy or adjacent to Greens Creek and one mile downstream from the Dairy;<sup>1</sup> and
- 2) The only reason for concealing Carol Robbins' identity and revealing her status as an adjacent landowner mere days before the Agenda consideration of the hearing request was because of Carol Robbins' fear of retribution.<sup>2</sup>

The truth now revealed, Carol Robbins' sworn testimony exposes the following facts:

<sup>1</sup> This statement was not only alleged in the Sierra Club's pleadings but it was sworn to in the Affidavit of Ken Kramer, attached to the Sierra Club's May 29, 2007 Request for Contested Case Hearing. *See also* Lone Star Chapter of the Sierra Club and Clean Water Action's Reply to Responses to Hearing Requests, p.7.

<sup>2</sup> *See* Sierra Club's Request for Contested Case Hearing, p. 2.

Q. Do you contend today, Ms. Robbins, that you are an owner of the 460 acres?

A. I contend that I have an interest in it under the terms of my father's will.

Q. Do you believe you are an owner today?

A. No.

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Q. ...what was your—what was your reason for not allowing your name to be revealed?

A. To protect my mother.

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Q. Okay. Not from a fear on your part but in deference to your mother?

A. No, in deference to my mother, I asked that my name be withheld.<sup>3</sup>

The Sierra Club not only concealed Robbins' identity but also failed to accurately represent to the Commissioners Robbins' true interest in the property adjacent to the Dairy.<sup>4</sup> The Sierra Club's representations and sworn affidavit testimony led the Commissioners and all parties to believe that Robbins held a present possessory fee simple interest in property adjacent to the Dairy. Moreover, the Club's representations concealed the important fact that the Dairy's true

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<sup>3</sup> Deposition of Carol Robbins, pp. 67:25-68:5; 74:24-75:1; 75:16-19. Excerpts of the Deposition of Carol Robbins are attached as Exhibit "I" to Applicant's Brief Regarding Certified Questions.

<sup>4</sup> The Sierra Club attempts to skim over this significant error by relying on Applicant's adjacent landowner list attached to the Dairy's application. Applicant's error on the adjacent landowner list, despite its diligence in verifying the information with the Erath County Appraisal Records, however, is no excuse for the Sierra Club's own failure of diligence. Even a cursory discussion with Robbins should have revealed the true character of her interest in the property adjacent to the Dairy as a remainder interest—but this fact was never revealed to the Commissioners at the time the hearing request was considered.

neighbor, owner and life estate holder of the property, Betty Robbins, expressly elected not to protest the Dairy's permit.<sup>5</sup>

Although the Sierra Club attempts to downplay the significance of the misrepresentations and concealment of relevant facts before the Commissioners, contending that a fresh start is obtained before the ALJ, the potential implications of this case are far-reaching. The grant or denial of a hearing request by the Commissioners is more than a mere gate-keeping role—it is an important exercise of authority that is vested in the three Commissioners of the TCEQ and must be preserved. The Sierra Club's conduct in this case threatens this role.<sup>6</sup> Questions Two and Three, however, attempt to address this conduct and preserve this important decision-making role of the Commissioners.

**B. Certified Question One Must be Answered “No” Because a Remainderman Interest Alone is Insufficient to Make a Person “Affected.”**

Protestants argue that a vested remainderman interest in property adjacent to Applicant is sufficient to make a person “affected” under Texas law. In this regard, Protestants state that a vested remainder interest is not contingent on any future event and that it is the remainderman interest that is the “true owner of the property itself.”<sup>7</sup> While a vested remainder interest itself may not be contingent on a future event, one important point ignored by Protestants is that a

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<sup>5</sup> See August 7, 2007 letter from Betty Robbins to TCEQ and August 17, 2007 letter from Betty Robbins to Eric Allmon, attached as Exhibits “J” and “K” to Applicant's Brief Regarding Certified Questions.

<sup>6</sup> In fact, from its first hearing request on May 29, 2007, the Sierra Club sought to look past the authority of the Commissioners to determine the validity of its request for contested case hearing. In discussing the concealment of its affected member's identity, the Sierra Club stated:

The Club is also willing to provide specific documentation of the person's identity, property ownership, and affected interests to an ALJ for *in camera* review in order for the ALJ to evaluate whether that member would qualify as an affected person.

Sierra Club's May 29, 2007 Request for Contested Case Hearing, p. 2 (emphasis added). Significantly, prior to filing its Reply to Responses to Hearing Requests the Sierra Club never offered to reveal the identity of its mystery member or the pertinent details of her affected interests to the Commissioners for review. Knowing that the standard for obtaining party status might be much lower before SOAH, the Sierra Club clearly desired for this determination to be made by an ALJ, not the Commissioners.

<sup>7</sup> See Brief of Sierra Club and Dr. Pritch Smith Regarding Certified Questions, at pp. 5-6.

remainder interest confers no greater present power, interest or authority than what it purports to be—a right of *future* enjoyment in property, nothing more.<sup>8</sup> Carol Robbins’ interest ripening into full ownership, on the contrary, *is* contingent on a future event—namely her survival of her mother.

Citing no authority, the Protestants claim that it is Carol Robbins who is the “true owner” of the property adjacent to the Dairy, but this is no more than mere argument. It is the present possessory owner, Betty Robbins, who has the authority to speak for the property, not the remainderman.<sup>9</sup> Giving the remainderman the opportunity to act on behalf of the property, specifically when (as in this case) it is directly contrary to the wishes of the present possessory owner, runs afoul of well-established law and places authority over property in the hands of a person whose interest may never ripen into full ownership. Consequently, a remainderman interest should not be sufficient to constitute a justiciable interest for purposes of finding a person to be “affected.” Question One seeks to improperly broaden the interest and authority allowed to a remainderman, and it should therefore be answered “No.”

Further problems with Question One are highlighted by the Protestants’ brief. Protestants misstate and oversimplify the well-settled analysis for determining “affected person” status in environmental permitting cases. Protestants state that their question boils down to one sentence: “is the holder of a vested remainderman interest potentially impacted by an application in a

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<sup>8</sup> See *Caples v. Ward*, 179 S.W. 856, 857-58 (Tex. 1915).

<sup>9</sup> See *Trimble v. Farmer*, 306 S.W.2d 157, 161 (Tex. 1957); *Enserch Exploration, Inc. v. Wimmer*, 718 S.W.2d 308, 310-311 (Tex. App.—Amarillo 1986, writ ref’d n.r.e.). The Last Will and Testament of Ben E. Robbins, which created the life estate and remainder interests in the property at issue, is further instructive regarding the life tenant’s authority. The Will states in pertinent part:

I give, devise and bequeath to my wife, BETTY E. ROBBINS, an estate to be measured by her natural life in the undivided one-half interest owned by me in our farm...and this shall include the right to execute leases for oil, gas and other minerals on this one-half *without the joinder of the remaindermen* hereinafter named....

Last Will and Testament of Ben E. Robbins, at p. 2 (emphasis added). A true and correct copy of the Will is attached as Exhibit “N” to Applicant’s Brief Regarding Certified Questions.

manner distinguishable from the general public?” Protestants then tie the analysis back to one issue—Carol Robbins’ remainder interest in property “whose value depends on the result of the permitting decision.”<sup>10</sup> This approach and Question One attempt to ignore the multiplicity of factors that are to be considered in the affected person analysis and seeks instead to define an adjacent landowner, without more, as an affected person. Such is not the standard.<sup>11</sup>

Had the Commission or the Texas Legislature intended for an adjacent landowner alone to be sufficient to be an affected person, they could have defined an affected person in that way. A plain reading of the applicable statute and rules demonstrate, without question, that an ownership interest in property and the location of the property are *only a few of many factors* to be considered. Protestants further attempt to lessen the standard for determining affected person status by suggesting that all that is required is to show an interest differentiable from the general public. Again this argument focuses solely on the “interest” component of the analysis, wholly ignoring the requirement that a person demonstrate how she is “affected” by the subject application.<sup>12</sup>

In this case, even if Carol Robbins’ remainder interest were sufficient to constitute a justiciable interest, the fact remains that she cannot point to any impact to her interest that is sufficient to make her an affected person. Carol Robbins holds a nonpossessory future interest in property that is entirely upstream and upgradient from the Dairy.<sup>13</sup> Carol Robbins lives over 100 miles away from the Dairy, visits the property infrequently and cannot identify any adverse effects to her health, safety or enjoyment of the property.<sup>14</sup> Question One seeks to allow

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<sup>10</sup> See Brief of Sierra Club and Dr. Pritch Smith Regarding Certified Questions, at pp. 6-7.

<sup>11</sup> See 30 TEX. ADMIN. CODE ANN. § 55.203.

<sup>12</sup> See *id.* at § 55.203(a).

<sup>13</sup> See Transcript of November 8, 2007 Pre-Hearing Conference, at pp. 43:3-6; 44:7-10; 45:5-6; 76:25-77:4. Excerpts from the Pre-Hearing Conference Transcript are attached hereto as Exhibit “A.”

<sup>14</sup> See Deposition of Carol Robbins, at pp. 7-8.

someone like Carol Robbins to be an affected person merely by holding some interest in property, no matter how tenuous, and in so doing, Question One attempts to significantly alter the affected person analysis. Question One should therefore be answered “No.”

**C. Certified Questions Two and Three Must be Answered “No.”**

1. The Commissioners’ interlocutory decision regarding hearing requests and the ALJ’s role in determining parties.

The Protestants, the Executive Director and OPIC each argue that Questions Two and Three should be answered “yes” because they allege that it is well established law that the Commission’s decision on hearing requests is merely interlocutory and not binding on an ALJ’s ability to designate parties at the preliminary hearing before SOAH. Therefore, the Sierra Club could rely on a new member, Pritch Smith, to obtain party status at the preliminary hearing. Although accurate in some respects, Applicant respectfully disagrees that this law necessitates an affirmative answer to Questions Two and Three.

Specifically, the presumption in applying section 55.211(e) is that the contested case hearing was granted based on a *valid hearing request* and that such request remains in place to justify the continuation of the hearing. In such a case, Applicant does not dispute that any party, whether they participated in the public comment period or whether their hearing request was previously denied by the Commission, may appear at the preliminary hearing seeking party status. Again, the presumption remains, however, that a valid hearing request was granted that justified the referral of the matter to SOAH in the first place. In this case, once the ALJ found that Carol Robbins was not an “affected person,” the only hearing request supporting the contested proceedings disappeared. As of that moment, the ALJ no longer had jurisdiction to consider Pritch Smith’s request for party status and remand to the Executive Director was the

only appropriate response.<sup>15</sup> Construing section 55.211(e) in the manner indicated by the Protestants, the Executive Director and OPIC, therefore, improperly broadens the intended application of this rule and thus renders the Commission's role, authority and action on hearing requests ministerial.<sup>16</sup> If blessed by the Commission, Sierra Club's conduct promotes gamesmanship before the Commission to obtain a hearing at any cost, including distortion of facts, purely with the objective of cleaning it up at a preliminary hearing before SOAH. Accordingly, Questions Two and Three should be answered "No."

2. Associations allowed to bolster or remake standing after referral to SOAH.

Protestants further argue that it is commonplace for associations to rely on multiple members over the course of a proceeding to confer associational standing. In the Sierra Club's words, if this were not allowed, no association would be able to maintain standing if the member relied upon before the Commission to obtain a contested hearing died prior to the preliminary hearing.<sup>17</sup> The Protestants miss the distinction made by Applicant in Questions Two and Three. In Applicant's certified questions, it is not a matter of relying on multiple "affected members" that is the problem. Rather, it is the recruitment of additional "affected members" *after* a referral of a case to SOAH based on an incomplete record that is problematic. Answering Questions Two and Three "No" would not prevent associations from a fair opportunity to participate in the hearing process as the Sierra Club suggests. Rather, in the spirit of HB 801, a negative answer to

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<sup>15</sup> See 30 TEX. ADMIN. CODE ANN. §§ 55.211(c); 80.101. Applicant requested that the ALJ rule on the Motion to Strike the Sierra Club before considering the other requests for party status, but the ALJ declined to do this and considered all of the requests for party status together.

<sup>16</sup> It is important to note that Pritch Smith would not be adversely affected by answering Questions Two and Three in the negative. Smith testified that he received notice of the proceedings and elected not to participate until the Sierra Club contacted him after referral of the case to SOAH and offered to financially assist him with his protest. See Deposition of Pritch Smith, at pp. 33:24-34:1; 34:8-14. Excerpts of the Deposition of Pritch Smith are attached as Exhibit "L" to Applicant's Brief Regarding Certified Questions. Had the true and relevant facts been before the Commission in August 2007 and the Commission properly denied the Sierra Club's hearing request at that time, Pritch Smith would not have been entitled to a contested case hearing thereafter.

<sup>17</sup> See Brief of Sierra Club and Dr. Pritch Smith Regarding Certified Questions, at p. 9.

Question Two specifically encourages associations to exercise the reasonable diligence that Sierra Club failed to exercise in this case and to locate its affected members prior to referral of a case to SOAH.<sup>18</sup> Such an approach encourages the early, honest and robust participation that is essential to ensuring strong public participation while maintaining a fair and equitable process.

Significantly, this is not a case where both Carol Robbins and Pritchey Smith were members of the Sierra Club at the time it filed its hearing request but only Carol Robbins was named for purposes of obtaining a hearing. In this case, *the Sierra Club did not have one member that was "affected" by Applicant's permit application* at the time it filed its hearing request or at the time the Commission considered and granted the request based on erroneous facts and misleading information. It was only after Sierra Club obtained a contested case hearing (and Applicant obtained a court order compelling Carol Robbins to provide sworn testimony regarding her interest in the adjacent property) that the Sierra Club, recognizing the peril of its situation, determined to find another "affected" member to appear at the preliminary hearing. And the decision to seek out such a member was made on the courthouse steps immediately after the court ordered the deposition of Carol Robbins.

The eleventh hour recruitment of new members by the Sierra Club must be filtered through the lens of the earlier conduct of the Sierra Club in obtaining their hearing request. The timing of the Sierra Club's actions in this case is highly suspect: waiting to finally reveal the identity of their mystery member until just over a week before the Agenda and after the time passed for any other parties to respond, misrepresenting the true nature of Carol Robbins' interest in the property adjacent to the Dairy, recruiting a new member only a few weeks prior to the preliminary hearing to act as an "affected" member in the protest of Applicant's permit, and

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<sup>18</sup> Applicants too have the right in this process to move forward with their applications unless there is a valid hearing request posed to the Commissioners within the requisite time period.

appearing at the preliminary hearing with new purportedly “affected” members with no prior notice to Applicant. The Sierra Club’s recruitment of Pritch Smith only a few weeks before the preliminary hearing exposes the potential for exploitation of the TCEQ rules regarding contested case hearings if Questions Two and Three are not fully considered and answered “No.” The only reason a contested case hearing was granted in this case was based on an incomplete record—*missing facts which were at all times in the possession of or accessible to the Sierra Club.*

3. Federal Delegation and Conservation of Judicial Resources.

Protestants further argue that all persons who can demonstrate they are affected at the time of the preliminary hearing must be admitted as parties to the proceeding in order to conserve judicial resources and limit agency appeals.<sup>19</sup> Citing no authority, Protestants state “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.”<sup>20</sup> This statement, however, is antithetical to a plain reading of section 55.211(e) which provides that a person’s failure to seek party status before SOAH shall be deemed a withdrawal of the hearing request.<sup>21</sup> If no other hearing request is in place, SOAH has no jurisdiction to proceed with a contested hearing.<sup>22</sup>

Protestants further urge the Commissioners that the federal delegation of the NPDES permitting program to the TCEQ mandated that “all affected persons would be provided the opportunity to participate in a hearing on a water quality permit if a hearing was held.” The Protestants further contend that answering Questions Two and Three “No” would violate the

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<sup>19</sup> The irony of this argument by Protestants is that their own conduct in this proceeding has resulted in an improper and unnecessary contested proceeding which has cost and will continue to cost the parties and taxpayers significant amounts of money, while delaying the implementation of the Applicant’s new permit to protect the North Bosque River Watershed.

<sup>20</sup> Brief of Sierra Club and Dr. Pritch Smith Regarding Certified Questions, at p. 10.

<sup>21</sup> See 30 TEX. ADMIN. CODE ANN. § 55.211(e).

<sup>22</sup> See *id.* at §§ 55.211(c); 80.101.

conditions of the federal delegation to administer the NPDES program. Protestants, however, are once again misguided. Questions Two and Three do not deny any affected persons the right to participate in a hearing if a hearing is held. To the contrary, Questions Two and Three concern the procedure of obtaining a contested hearing and ensuring that SOAH has appropriate jurisdiction before continuing with a contested hearing. Further, both Sierra Club and Pritchey Smith had ample opportunity to participate in the public comment process and to file valid hearing requests. Requiring Protestants to adequately follow the rules and procedures for obtaining a contested case hearing does not equate with a denial of an opportunity for public participation.

4. Unfair Surprise.

The Protestants argue that the Commission's limitation of issues to be considered before SOAH sufficiently eliminates any unfair surprise resulting from the participation of new parties at SOAH. Again, the Protestants miss the point. Applicant's complaint in this case is not one of unfair surprise concerning the *issues* before SOAH, but rather, it is the needless expense of time and money to defend against Protestants in a contested case hearing that should never have been ordered and, but for the misrepresentations and strategic concealment of relevant facts before the Commissioners by the Sierra Club, would not have been ordered, that is the Applicant's chief complaint. The Applicant, therefore, is greatly damaged and prejudiced by the conduct of the Sierra Club in this case and the appearance of Pritchey Smith at the preliminary hearing. The Applicant's permit has been delayed for many months and continues to be delayed, and Applicant is now forced to expend tens of thousands of dollars to defend its permit in a battle that is not and never has been waged by Protestants in accordance with proper policies, procedures and rules of the TCEQ.

## **II. REQUEST FOR REMAND**

Upon answering the certified questions in the negative, Applicant requests that the Commissioners enter an order declaring that no valid hearing request remains in effect to support the jurisdiction of the ALJ, that the matter is uncontested, and the ALJ is to remand the application to the Executive Director.

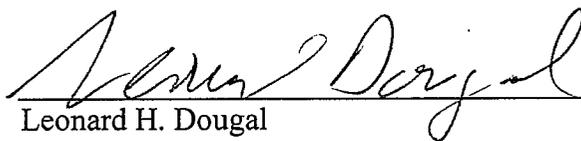
## **III. CONCLUSION**

The certified questions submitted to the Commissioners address important policy considerations involving the Commissioners' decision-making role in contested case hearings. In fulfilling this role, the Commissioners are charged with the duty of maintaining a strong balance between encouraging public participation and ensuring a fair process. Such a balance is integral to the environmental permitting process as a whole. The unique factual scenario presented by this case emphasizes the important policy considerations at stake and the danger posed by certain groups seeking to thwart the process. Answering the certified questions "No" successfully achieves the necessary balance between public participation and fairness while sustaining the role of the Commissioners' to determine hearing requests. For the foregoing reasons and for the reasons set forth in Applicant's Brief Regarding Certified Questions, Applicant respectfully requests that the Commissioners answer the certified questions "No."

## **IV. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Applicant Hidden View Dairy respectfully prays that the Commissioners answer all certified questions "No", order the ALJ to remand the application to the Executive Director and grant such other and further relief to which Applicant may be justly entitled.

Respectfully submitted,



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**ATTORNEYS FOR HIDDEN VIEW DAIRY**

**CERTIFICATE OF SERVICE**

This is to certify that on this 4th day of February, 2008, a true and correct copy of the foregoing document was served on the following parties via hand delivery:

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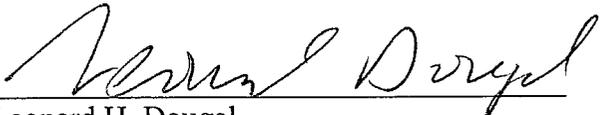
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Leonard H. Dougal

# Attachment

A

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:

KENNEDY  
REPORTING  
SERVICE

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APPEARANCES

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09:50

10:54 1 MR. BRADBURY: Point well taken, Your  
2 Honor. I will put my questions aside.

3 Q (By Mr. Bradbury) Ms. Robbins, you agreed  
4 with me that the ranch that you claim the interest in  
10:55 5 is entirely upgradient from the Hidden View Dairy?

6 A Essentially.

7 Q And there is no risk of a discharge from the  
8 dairy reaching the ranch?

9 A As I recall, in the deposition, I mentioned  
10:55 10 that there is a field from which a discharge could  
11 occur into Greens Creek below the reservoir.

12 Q Now, let's talk about two different things.  
13 The reservoir, when we talked about that, your  
14 reservoir is upstream of the dairy. Isn't that  
10:55 15 correct?

16 A Correct.

17 Q Okay. And what field is it that you're  
18 talking about that belongs to Hidden View Dairy that  
19 could potentially discharge into that reservoir?

10:56 20 A It's a field that I can see when I walk the  
21 place that the topography is such that there is a  
22 downward slope that could enable a discharge to enter  
23 Greens Creek.

24 Q Now, when I asked you in your deposition if  
10:56 25 the entire property, your property, the ranch,

10:56 1 adjacent to the dairy is upgradient with no  
2 possibility of runoff, what did you tell me?

3 A I don't remember. Can you --

4 Q Yes. Turn to Page 63, if you would, Line 6.

10:56 5 Do you see that?

6 A I do.

7 Q And, "Question: 460 acres, we know the ranch  
8 is upgradient from Hidden Dairy," and what did you  
9 say?

10:57 10 A "Almost entirely I would say."

11 Q My question: "So runoff is not going to go  
12 onto the 460 from Hidden View?" And what did you say?

13 A "Okay. And so" -- I'm sorry -- "not from  
14 Hidden View itself."

10:57 15 Q So do you still agree with me that due to the  
16 ranch being upgradient from Hidden View that there is  
17 no possibility of a discharge from the dairy to the  
18 ranch?

19 A Except for one area. So I think, for me, the  
10:57 20 question was confusing relative to the use of 460  
21 acres being upgradient.

22 Q So is your testimony today you do believe  
23 that there is a potential for discharge from the dairy  
24 to the ranch?

10:58 25 A I'm looking at Line 17, and my answer there.

10:58

1 I think it's possible for there to be runoff from  
2 Hidden View into Greens Creek where we are adjacent  
3 landowners. It couldn't enter the reservoir except  
4 from off-site application fields.

10:58

5 Q But the reservoir is upstream from the dairy?

6 A Correct.

7 Q And we'll talk about the creek in a moment,  
8 but the ranch land on which your mother lives is

10:58

9 entirely upgradient, with no potential for discharge  
10 to that ranch, isn't it?

11 A I'm concerned that there is this portion of  
12 Greens Creek, which is downstream from the reservoir  
13 and is adjacent to Hidden View Dairy, and that there  
14 could be runoff, and that, in my mind, is part of the  
15 460 acres.

10:59

16 Q It's the creek?

17 A It's the creek.

10:59

18 Q Okay. Do you have any facts, and did you  
19 share with me any facts at all regarding past events  
20 where there were discharges from this dairy into that  
21 creek?

22 A As I recall, I told that you I did not have  
23 firsthand information about discharges into the creek.

10:59

24 Q And, in fact, Ms. Robbins, your family has  
25 not had any problems with the dairy for more than four

11:51

1

(Witness sworn)

2

JUDGE SCUDDAY: Have a seat, please,

3

sir. State your name for the record.

4

WITNESS DeJONG: My name is William

11:51

5

Nicholas DeJong.

6

WILLIAM NICHOLAS DeJONG,

7

having been first duly sworn, testified as follows:

8

DIRECT EXAMINATION

9

BY MR. BRADBURY:

11:51

10

Q Mr. DeJong, are you the owner of Hidden View

11

Dairy?

12

A Yes.

13

Q To the point, you heard Ms. Robbins testify

14

about the northwest corner of your facility?

11:51

15

A Yes.

16

Q Are you familiar with that area?

17

A Yes.

18

Q Okay. And are you familiar with the property

19

boundaries that exist on the northwest corner of your

11:51

20

property?

21

A Yes.

22

Q You understand what you own and what the

23

Robbins own?

24

A Yes.

11:51

25

Q All right. And tell me, if you would, from

11:51 1 the northwest corner of your dairy property, is the  
2 entirety of the Robbins' property both upstream and  
3 upgradient from the northwest corner of your property?

4 A Yes, it is.

11:52 5 Q Is there any way that discharge could run off  
6 downhill or downstream from the northwest corner of  
7 your property on to the Robbins' property?

8 A No, there's not.

11:52 9 Q Mr. DeJong, do you have any third-party waste  
10 application fields -- any fields on which you utilize  
11 that are located such that runoff, if it occurred,  
12 would reach the reservoir?

13 A None that I am aware of at all.

11:52 14 MR. BRADBURY: That's all I have for  
15 Mr. DeJong, Your Honor.

16 JUDGE SCUDDAY: Mr. Allmon?

17 CROSS-EXAMINATION

18 BY MR. ALLMON:

11:52 19 Q Have you committed in the application or in  
20 the permit in any way to the location of off-site  
21 application fields?

22 A Have I --

23 Q Have you set forth in your application where  
24 the off-site application fields are to be located?

11:53 25 A No, I have not.

1 C E R T I F I C A T E

2 STATE OF TEXAS )

3 COUNTY OF TRAVIS )

4 I, Evelyn Coder, a Certified Shorthand  
 5 Reporter in and for the State of Texas, do hereby  
 6 certify that the above-mentioned matter occurred as  
 7 hereinbefore set out.

8 I FURTHER CERTIFY THAT the proceedings  
 9 of such were reported by me or under my supervision,  
 10 later reduced to typewritten form under my  
 11 supervision and control and that the foregoing pages  
 12 are a full, true and correct transcription of the  
 13 original notes.

14 IN WITNESS WHEREOF, I have hereunto set  
 15 my hand and seal this 15th day of November 2007.

16  
 17  
 18  
 19 

20 EVELYN CODER  
 Certified Shorthand Reporter  
 CSR No. 2845-Expires 12/31/07

21 Firm Certificate No. 276  
 22 KENNEDY REPORTING SERVICE, INC.  
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