

**TCEQ DOCKET NO. 2007-0831-AGR**

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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 TEXAS  
CHIEF CLERKS OFFICE  
COMMISSION ON

ENVIRONMENTAL QUALITY

**APPLICANT'S RESPONSE TO HEARING REQUESTS**

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

Hidden View Dairy (Applicant), the applicant herein, files this response (Response) to the requests for a contested case hearing submitted by the two associations listed herein. Hidden View Dairy (Dairy) is owned, in part, by Mr. William N. DeJong. He has been in the dairy cattle business for more than twenty years, and in the last five years, Mr. DeJong has received no complaints, including odor complaints, about the Dairy's operations nor any notices of violation from the Texas Commission on Environmental Quality (TCEQ).<sup>1</sup> In fact, Mr. DeJong is generally recognized as an innovative leader within the dairy industry. Based on the failure of the two associations to comply with the "standing" requirements applicable to their hearing requests and for the other reasons set forth below, Applicant respectfully requests the Commission to deny the two hearing requests and issue TPDES Permit No. WQ0003197000 to the Applicant.

**I. Background and Procedural Information**

The Applicant operates a dairy that is permitted under an existing TPDES registration for 2,000 head. Applicant is required to convert the existing TPDES registration to an individual permit, pursuant to Subchapter L of Chapter 26, Texas Water Code. More than three years ago, in early-2004, the Applicant filed this application for an individual permit that would require the Dairy's compliance with the new and substantially more stringent regulations for dairy operations. During the intervening period, the Applicant and approximately a dozen other dairies were sued in Federal District Court by the City of Waco. The Applicant subsequently negotiated and entered into a good faith settlement agreement with the City of Waco that imposes further operating requirements on the Dairy, above and beyond the TCEQ's new regulations. As expressly allowed under the settlement agreement, this application seeks to increase the permitted head count to a total of 3,000 head, of which only 2,500 could be milking head.

<sup>1</sup> Mr. DeJong's complete Compliance History is provided in an exhibit attached hereto, and the single Agreed Order (a 1660 type order) is now more than 5 years old.

The Dairy is located in Erath County, in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River Basin. This area of Texas is well known for its agribusiness economy and many landowners and local businesses are engaged in farming and ranching (See e.g., photograph of Hidden View Dairy and surrounding proximity, marked as Applicant's **Exhibit 1**). Most of the neighbors to this Dairy keep cattle, farm or lease their land to cattle operations or run dairy operations similar to that of the Applicant's Dairy.

It is unquestioned that the proposed permit imposes more stringent and more environmentally-protective measures on the operation of the Dairy. The Applicant is eager to have the permit issued to proceed with full implementation of those protective measures, which includes an expanded Retention Control Structure (RCS) system, increased buffer distances between facilities and surface water, and greater restrictions on land application of nutrients.

Mr. DeJong has worked over the years to maintain a good relationship with his neighbors and others entities that are great distances from his Dairy (e.g., City of Waco). Approximately, 9 landowners are located adjacent to the Dairy, and approximately 22 residences are located within a one-mile radius of the Dairy's property boundary. See Applicants' maps marked as Applicant's **Exhibits 2 and 3**. Mr. DeJong's neighbors, including those owning land within 500 feet of the Dairy property, were individually mailed notice of the permit application on several occasions during the application process. Those neighbors who requested were also mailed a copy of the Executive Director's written response to the public comments. Additionally, notice of the application was twice published in a well known, locally-distributed newspaper of general circulation, as required by TCEQ rules.<sup>2</sup> In this matter, not a single neighbor of the Dairy, and no person within one-mile of the Dairy property, filed a protest, objection or request for hearing or reconsideration on the Application. Further, the City of Waco, the long-standing critic of dairy operations in the North Bosque Watershed reached a settlement with the Dairy on January 11, 2006, that specifically allowed the Dairy to pursue its amended TPDES permit application. See "Settlement Agreement," marked as Applicant's **Exhibit 4**, TERMS AND CONDITIONS OF THE AGREEMENT, Term 2, pp. 2. Finally, as shown in the comment letters, marked as Applicant's **Exhibits 5 and 6**, both the EPA and U.S. Fish and Wildlife Service have stated in writing that they do not oppose the issuance of the proposed permit, which is important when considering certain objections raised by the associations.

The only opposition to the application comes from two activist environmental associations, neither of which has demonstrated the required elements to obtain standing in this case, as discussed below. The two hearing requests were filed by the law firm of Lowerre & Frederick on behalf of the Clean Water Action and the Lone Star Chapter of the Sierra Club (Lone Star). One of the requests (Lone Star) fails to disclose the name and location of its closest purported member and demands that an Administrative Law Judge perform an *in camera* evaluation of whether or not the member would qualify as an affected person. There is no precedent for such action. This tactic serves the purpose of further delaying consideration of the Application and would prevent the goals of the Bosque Total Maximum Daily Load (TMDL) from being achieved. Finally, this tactic is against TCEQ rules and attempts to remove a matter

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<sup>2</sup> The Notice of Receipt and Intent to Obtain a Water Quality Permit was published in the *Stephenville Empire Tribune* on April 7, 2004. The most recent notice for this application was published in the *Stephenville Empire Tribune* on December 19, 2006.

that is fully under the jurisdiction of the Commission (i.e., the determination of affected person status and Commission Action on Requests for Contested Case Hearing).<sup>3</sup> Counsel for the Applicant previously contacted counsel for Lone Star to seek clarification of the basis for Lone Star's standing, and notified Lone Star that the Dairy would object to the association's standing due to its failure to identify its alleged nearby member, the member's precise location, and how the member is personally affected by the Application. Counsel for Lone Star refused to disclose the identity and location of the purported member. (See Letter to Lowerre & Frederick, marked as Applicant's **Exhibit 7**.)

The Applicant is an exemplary dairy operator, has a more than acceptable compliance history and has received numerous awards for producing high-quality milk, as shown by Applicant's **Exhibits 8 and 9**. Additionally, the Applicant was the first dairy in the watershed to utilize a novel vacuum scrape system to collect wet manure and clean the aisles adjacent to the animal stalls, rather than the more traditional water flushing system. (See e.g., the pictures in the Affidavit of Mr. Norman H. Mullins, P.E., marked as Applicant's **Exhibit 10**.) The aisles are vacuumed twice per day. The benefits of the vacuum system include: a) reduction of odors due to prompt collection of animal manure, b) reduced use of wash water for pen and aisle cleaning, and c) collection of a significantly greater amount of manure and the corresponding reduction in amount of volatile solids which would otherwise be transferred into the RCSs. Such activities also take place within a series of covered, freestall barns that prevent rainwater infiltration. The Applicant has expended a great deal of time and resources implementing these and other innovative operating practices at the Dairy.

The draft permit would further improve the Dairy's infrastructure by expanding the volumetric capacity of the existing retention control structures (RCSs), which will be more protective for the environment than the requirements of the current permit. The facility contains a treatment pond and four retention control structures (RCSs)<sup>4</sup> and nine land management units (LMUs).<sup>5</sup> The expansions and improvements to the retention control system, which would be certified by a professional engineer, would increase required RCS capacity by more than 50%. Although this permit does not authorize a continuous discharge of wastewater, the permit conditions would ensure that all dairy operations would be ready for a 25-year, 10-day storm event (i.e., considerably more capacity than the 25-year, 24-hour storm event standard that remains in effect pending issuance of the amended permit). These benefits, along with an explanation and certification of their technical merits, are listed in an affidavit signed by Mr. Norman H. Mullin, a licensed Texas professional engineer, which is attached to this brief as Applicant's **Exhibit 10**.

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<sup>3</sup> See 30 TAC §55.211.

<sup>4</sup> The RCSs would have total required capacities without freeboard of 6.3 acre-feet for the treatment pond, 53.9 acre-feet for RCS #1 and RCS #2, 13.5 acre-feet for RCS #3, and 5.9 acre-feet for RCS #4 (n=4).

<sup>5</sup> LMU #1 is 26 acres, LMU #2 is 64 acres, LMU #3 is 54 acres, LMU #3A is 15.2 acres, LMU #4 is 40 acres, LMU #4A is 21.1 acres, LMU #5 is 23.4 acres, LMU #6 is 18 acres and LMU #7 is 49.5 acres (n=9).

## II. Applicable Law

**No Right to Contested Case Hearing:** TCEQ's rules recognize that there is no right to a contested case hearing when an applicant's permit application would not (1) increase significantly the quantity of waste authorized to be discharged or (2) change materially the pattern or place of discharge.<sup>6</sup> In addition to these two requirements, so long as the amended permit would maintain or improve the quality of waste discharged, an opportunity for public meeting was given, consultation and response to all public comment was provided, and the permit applicant's compliance history for the preceding five years raise no issues regarding the ability to comply with the material terms of the permit, there is no right to a contested case hearing.<sup>7</sup> Similar to the Texas Clean Air Act's position on public participation in "no increase renewal applications<sup>8</sup>," water quality permit amendments that do not materially increase the quantity of waste to be discharged and that do not change the place of discharge, are not subject to the contested case process.

**No Right to Hearing Under Air Standard Permit:** The Dairy is currently authorized, for air quality purposes, under the Air Standard Permit for AFOs set forth at 30 TAC § 321.43. The Dairy has qualified because it holds a TPDES authorization and meets the buffer distances and related requirements set forth by rule. Unlike an individual air permit issued under 30 TAC Chapter 116 (i.e., 30 TAC § 116.111), there is no right or opportunity for a contested hearing on the air quality aspects of an AFO or CAFO that qualifies for coverage under the AFO Air Standard Permit.

**Affected Person Requirement:** The Commission must assess the sufficiency of the hearing requests and must determine whether the requests were filed by "affected persons."<sup>9</sup> Hearing requests on a water quality permit application are considered under the Texas Water Code, and may only be filed by an "affected person."<sup>10</sup> The legal requirements for standing are explained in a recent CAFO water quality permitting case styled *Collins v. Texas Natural Resource Conservation Commission*.<sup>11</sup> In order for a person to be "affected," such person must show that the regulated activity will likely impact his or her health, safety and use of property. *Collins* also required that the person show the likely impact of the regulated activity on the person's use of the potentially impacted natural resources. With respect to associations, the TCEQ's rules, consistent with principles established in civil law, require particular disclosures and demonstrations with respect to the association's interests and its members, as generally set forth in 30 TAC § 55.205.

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<sup>6</sup> 30 TAC § 55.201(i)(5).

<sup>7</sup> 30 TAC § 55.201(i)(5)(A-E).

<sup>8</sup> TEX. HEALTH & SAFETY CODE § 382.056(g).

<sup>9</sup> TEX. WATER CODE § 5.115.

<sup>10</sup> TEX. WATER CODE § 5.115, § 5.556.

<sup>11</sup> 94 S.W.3d 876 (Tex. App.-Austin 2002, no writ).

**Material and Relevant Issues:** If the Commission determines a hearing request is timely and fulfills the requirements for proper form, and the hearing requester is an affected person, the Commission must determine if any of the issues should be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing as follows:

- (1) The issue must involve a disputed question of fact;
- (2) The issue must have been raised during the public comment period; and
- (3) The issue must be relevant and material to the decision on the application.<sup>12</sup>

If a requester does not demonstrate that he or she is an affected person, the hearing request must be denied.

**Failure to Meet Applicable Legal Requirements:** In this case, as further analyzed below, the hearing requests filed by Lowerre & Frederick on behalf of Clean Water Action and Lone Star should be denied by the Commission because there is no right to a contested case hearing on this application and they both fail to demonstrate, among other things, how any of their members would be personally affected by the permit application. Neither hearing request adequately explains any personal justiciable interest and neither hearing request specifically identifies a member that resides in close proximity to the facility. Additionally, the hearing requests raise a number of issues that do not involve disputed questions of fact, but rather involve questions of law and policy to be decided by the Commissioners. It would not be appropriate to remand such issues to SOAH even if the associations had demonstrated standing and a right to a hearing.

### III. Analysis of Hearing Requests

As a threshold matter, the Commission must consider whether or not there is a right to a contested case hearing – beyond the right to submit public comments and receive a formal written response from the Executive Director – regarding the issuance of a substantially more stringent “no discharge” water quality permit to a currently authorized dairy in the North Bosque Watershed. By statute, dairy CAFOs in the North Bosque Watershed, even existing operations like the Applicant’s, must obtain individual permits regardless of whether they seek permits that improve the environmental protectiveness of the existing operation. In this case, the Applicant has requested an individual permit that significantly improves the environmental protectiveness of the dairy, this Application would not (1) *increase significantly the quantity of waste authorized to be discharged* nor (2) *change materially the pattern or place of discharge*.<sup>13</sup>

In contrast to most other Chapter 26 TPDES discharge permits, this permit application is a “no discharge” application, as it does not authorize continuous discharges of pollutants. Unlike a wastewater treatment plant that continuously discharges large volumes of effluent into a waterway, only exceptional chronic or catastrophic rainfall events, such as a 25-year, 10-day rainfall event, might result in an overflow “discharge” from this Dairy into a flooded watershed.

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<sup>12</sup> See TEX. WATER CODE §5.556(d); see also 30 TAC §50.115(c).

<sup>13</sup> 30 TAC §55.201(i)(5).

Regardless, this permit, would not “significantly increase the quantity of waste to be discharged” because all of the manure, sludge or wastewater from this facility in excess of the amount allowed by the Dairy’s nutrient utilization plan (NUP) and/or certified nutrient management plan (CNMP) must be removed from the Dairy and managed off-site or out of the watershed. For example, the manure generated by the Dairy’s “new” cows will be transported outside the North Bosque Watershed for beneficial reuse as reflected in the settlement agreement with the City of Waco rather than being managed on-site. This permit application would not materially alter or change the *pattern or place of discharge* because there is no new land management unit being permitted. Further, because the amended permit requires significantly larger RCS capacity, greater buffer distances between land application and surface water bodies, operation in compliance with a phosphorous-based NUP, NMP and/or CNMP, and numerous other more stringent operational practices, the activity being authorized by the amendment will unquestionably maintain or improve the quality of the waste to be discharged. Therefore, consistent with the requirements of 30 TAC §55.201(i)(5), this amended permit would not increase significantly the quantity of waste authorized to be discharged, not change materially the patter or place of discharge, and will maintain or improve the quality of waste authorized to be discharged.<sup>14</sup> Additionally, as to air quality/odor issues, only Lone Star raises any such issue. As discussed previously, there is no right to a hearing provided under the Air Standard Permit. Therefore, the Applicant respectfully requests the Commission deny all hearing requests for this matter and issue TPDES Permit No. WQ0003197000.

Should the Commission disagree with the Applicant’s position that there is no right to a contested case hearing in this case, the Commission must then decide whether or not Lone Star and Clean Water Action have met the requirement to demonstrate status as affected persons. A group or association may request a contested case hearing only if the group or association meets **all** of the following requirements: (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right; (2) the interests the group or association seek to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.<sup>15</sup>

A. Clean Water Action states that it has “nationwide membership” and that its members include people who receive “water service from the City of Waco,” which is a municipality that operates a municipal water treatment facility located nearly 100 stream miles from Bosque County. Recall that the municipal entity from which these persons receive their water service has entered into a good faith settlement agreement with the Applicant concerning the present application. Clean Water Action does not explain why or how any of its members are affected by the permit application in a manner that is different than any member of the general public as required by 30 TAC § 55.205(a)(1). Furthermore, Clean Water Action has not met its burden of demonstrating how the interests it seeks to protect in this matter are germane to the organization’s purpose, in contravention of § 55.205(a)(2). For example, simply by virtue of the

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<sup>14</sup> The Applicant notes that, consistent with the other procedural and substantive requirements of 30 TAC §55.201, an opportunity for public meeting was given, a response to comment was provided and that the Applicant’s compliance history for the previous five years raises no issues regarding the Applicant’s ability to comply with TPDES Permit No. WQ0003197000.

<sup>15</sup> 30 TAC §55.205(a).

organization's name, issues unrelated to water quality (e.g., localized air emissions or nuisance odors) do not appear to be germane to the organization's purpose. Clean Water Action has wholly failed to meet the legal requirements for "standing" by a group or association.<sup>16</sup>

B. Lone Star also fails to meet the legal requirements for standing by a group or association because, among other reasons, they do not properly identify their members by name and do not show that any of its members reside in close proximity to the facilities authorized by this permit. Accordingly, Lone Star has failed to comply with 30 TAC § 55.205(a)(1). Furthermore, Lone Star has failed to meet its burden of demonstrating how the interests it seeks to protect in this matter are germane to the organization's purpose, in violation of 55.205(a)(2). By way of example, it would appear that localized air emissions or nuisance odors potentially affecting an adjacent property owner are not germane to the organization's purpose. Even if germane, these are the types of issues that plainly require the participation of the individual member in the case, in contravention of § 55.205(a)(3). Lone Star has failed to meet the legal requirements for "standing" by a group or association.

1. **Lone Star's "Unidentified Member"**

According to Lone Star's hearing request, an undisclosed member of their club (Unidentified Member) owns property that is situated "adjacent to either the primary location of the facility (not including the off-site application fields), or adjacent to Green Creek within one mile downstream of the primary location of the facility." This description of the property is not adequate for the Commission to determine whether or not the person would be affected by the permit application. Even the Applicant is at a loss to determine or speculate as to the identity of the Unidentified Member. Lone Star states that "the Club will not publicly disclose the identity of this person [unidentified member]," which position was reasserted by Lone Star in a recent telephone discussion with counsel for the Applicant. Lone Star failed and has consciously refused to provide his or her name, daytime telephone number, address and thus failed to "identify" one or more of its members who would have standing to request a hearing in his or her own right.

Lone Star's hearing request fails to conform to the TCEQ's rules. The rules require that hearing requesters "give the name, address, daytime telephone number, and where possible, the fax number of the person who filed the hearing request."<sup>17</sup> More importantly, a proper hearing request must identify the requestor's personal justiciable interest affected by the application by including a "brief but specific written statement explaining in plain language the requestor's location and distance relative to the proposed facility and how and why the requestor believes he or she will be adversely affected by the proposed facility in a manner not common to the general members of the general public."<sup>18</sup> The Notice prepared by TCEQ included detailed instructions for how to contest the permit application, and requested that each protestant identify themselves by name and by physical address. Lone Star has failed to satisfy these legal requirements; they did not definitively state a legally identifiable location of the Unidentified Member's property

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<sup>16</sup> 30 TAC §55.205.

<sup>17</sup> 30 TAC §55.201(d)(1).

<sup>18</sup> 30 TAC §55.201(d)(2).

and they did not state a personal justiciable interest (e.g., health concern or livestock risk) of this person.

The Executive Director (ED) filed a Response to Public Comment (RTC) on April 26, 2007. This document was mailed to all interested persons, including those who asked to be placed on the mailing list for this application. The RTC's cover letter included specific instructions to persons, groups or associations concerning their legal burden to demonstrate that they would be an affected person if they chose to request a hearing of the ED's decision. These instructions explain how, when and where to file hearing request.<sup>19</sup> These instructions note that only an affected person may request a hearing; therefore, these instructions are consistent with Texas' laws that establish standing requirements for parties to contested case environmental permit hearing. See TCEQ letter, marked as Applicant's **Exhibit 11**.

Although Lone Star notes that "this person has a reasonable fear of retribution if they are identified as a member [of Lone Star]," Lone Star does not explain how this person would be personally affected in anyway by the permit application.<sup>20</sup> Practically speaking, people usually complain about things that bother them. Here, the Unidentified Member did not complain about any personal interest; he or she did not complain that their health would be affected, that their enjoyment of their property would be affected or that their visits or trips to their property would be impaired in any way. Other than noting the "*movement of odors onto his/her property*," Lone Star does not specifically explain how the Unidentified Member's health or property would be affected or whether or not this person would be adversely impacted by any nuisance conditions. Further, Lone Star does not even allege that the Unidentified Member resides in or near the Dairy, only that the person "owns property." A non-resident property owner would normally have no legitimate claim that the mere "movement of odors" onto property created a nuisance, and that allegation is even more implausible in a rural area where keeping livestock is common and widespread.

As correctly pointed out by the ED's RTC, nuisance is defined as any discharge of air contaminants including, but not limited to, odors of sufficient concentration and duration that are or may tend to be injurious to or that adversely affects human health or welfare, animal life, vegetation, or property, or that interferes with the normal use and enjoyment of animal life, vegetation, or property.<sup>21</sup> Without knowing the exact location of the Unidentified Member's property, where the Unidentified Member resides, or how often the Unidentified Member might frequent his or her property, and knowing that odors concern an "air permitting issue" that is addressed by the Air Standard Permit for which this facility qualifies, the mere allegation the "movement of odors" onto some unnamed piece of potentially uninhabited, unvisited property is insufficient to create a personal justiciable interest, which is a prerequisite for being an "affected person." As a practical matter, the vast majority of property adjacent to and in close proximity to

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<sup>19</sup> Furthermore, should any member of the public, group or association need assistance or not understand these instructions, TCEQ's Chief Clerk provided the phone number for TCEQ's Office of Public Assistance.

<sup>20</sup> Lone Star expressly states that it is "not alleging that Hidden View Dairy would commit any act of intimidation". It should be obvious from the lack of protests from neighbors that Mr. DeJong has worked hard to cultivate relationships with all his neighbors.

<sup>21</sup> See 30 TAC §321.32(32).

the dairy is used for agricultural purposes, mostly the feeding and grazing of livestock (including cattle), that have odors that are indistinguishable from this dairy operation.

Moreover, Lone Star's hearing request is defective because proximity of a person's property to the *outer boundary* of the Dairy, as referenced by Lone Star, is not the relevant distance for consideration. Rather, the relevant distance is the distance of an occupied residence (or business, school, church or public park) to the operation's *permanent odor sources* (e.g. confinement areas, lagoons and manure stockpile areas, but not land management units).<sup>22</sup> This is the required measurement set forth in the Air Standard Permit.<sup>23</sup> It should be noted that, in *Collins v. Texas Natural Resource Conservation Commission*, a court upheld the Commission's *denial* of a hearing request by a property owner whose property was located 590 feet from the boundary of a CAFO.<sup>24</sup> Lone Star's hearing request is defective, as it does not provide the required distance or proximity information necessary to evaluate the distance from the permanent odor sources.<sup>25</sup> Finally, the required buffer distance for the Dairy is one-quarter mile (from the permanent odor sources)<sup>26</sup> and it is clear that no neighbor owns a residence or business within that distance.<sup>27</sup> For these reasons, the Commission should find that this Unidentified Member does not have standing in his or her own right and therefore the Commission should deny Lone Star's hearing request.

## 2. Lone Star's Members Adjacent to Off-Site Application Fields

Lone Star asserts that Boyd Waggoner and Donald Turner are members of the "Sierra Club" and own 1800 acres in Erath County or "property within 10 miles of the facility," respectively. Neither of these descriptions demonstrates that Boyd Waggoner and Donald Turner own property, reside or frequent areas in close proximity to the facilities authorized under this permit application. Lone Star notes at least four times that both properties are "off-site" and thus not in close proximity at all to the facilities authorized under this permit. Also, Lone Star does not identify Boyd Waggoner and Donald Turner as being members of their specific group or association (i.e., the Lone Star Chapter of the Sierra Club). Lone Star is ostensibly asking the Commission to provide a contested case hearing to any association that has a member who either resides or runs cattle in the same county as a dairy facility.

Similar to the deficiencies in the descriptions of the Unidentified Member, Lone Star also fails to explain how either Boyd Waggoner, Donald Turner or their properties would be adversely impacted by facilities authorized under the permit application. Lone Star asserts that Boyd Waggoner's ability to use his own property for "domestic and livestock issues" is potentially affected by the permit application. Would any domestic and livestock activities on Boyd Waggoner's property not create "odors" that are any different from the odors created by livestock on the proposed facility? For these reasons the Commission should find that these

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<sup>22</sup> 30 TAC §321.32(39) (definition of permanent odor sources).

<sup>23</sup> 30 TAC §321.43(j)(2)(C) (measurement of buffer distance).

<sup>24</sup> 94 S.W.3d 876, 879 (Tex. App.-Austin 2002, no writ).

<sup>25</sup> The Clean Water Action does not raise any odor or air quality concerns.

<sup>26</sup> E.g., the expansion of an AFO that was in operation on or before August 19, 1998. 30 TAC § 321.43(j)(2).

<sup>27</sup> See the Area Land Use Map in the exhibit attached hereto.

persons do not have standing to request a hearing in their own right, thus precluding Lone Star's ability to rely on their membership as a basis for their "group or associational hearing request."

### 3. Lone Star's Downstream Members

Lone Star is also seeking standing based on the downstream ownership of property by "other members," including Donald Turner, who is "believed to own property within 10 miles of the primary location of the facility" that is situated along Green Creek. In this instance, unlike Lone Star's description of the "Unidentified Member" and its "Adjacent Members," Lone Star attempts to explain how Donald Turner's land *might* be impacted by contamination of Green Creek (e.g., impact aesthetic enjoyment, cause contamination and affect his land for domestic and livestock purposes). Since Lone Star's hearing request admits that Donald Turner owns land that is NOT in close proximity to the facility and since Donald Turner's intended use of his own land is for domestic and livestock purposes (a very similar activity that is being considered under the permit application), Lone Star fails to explain how Donald Turner would be impacted any differently than any other landowner who ran a livestock operation within 10 miles of the proposed facility. For these reasons, the Commission should find that Lone Star failed to properly identify a downstream member who has personally justiciable interest at stake, thus none of these members have standing to request a hearing in their own right.

### 4. Lone Star's Members Using Water as Drinking Source

Lone Star briefly explains that it has "over 75 members who reside in the City of Waco and receive water from Lake Waco" and seeks standing on this basis. Similar to Mr. Turner, the City of Waco, including its residents, are not in close proximity to the activities being regulated under this permit application. The Applicant notes that the City of Waco has settled its legal dispute for dairy operations located in the Bosque River Watershed (*See* Settlement Agreement, marked as Applicant's **Exhibit 4.**) Residents of Waco, including any member of Lone Star, would not be impacted in a way that is substantially different from any other member of the public. For these reasons the Commission should find that these persons do not have standing to request a hearing in their own right.

### 5. Conclusion

The hearing requests filed by Lowerre & Frederick on behalf of Lone Star and Clean Water Action should be denied because they both fail to demonstrate how any of their members would be personally affected by the permit application. Neither of these requests is consistent with the notices and instructions that were provided by the Chief Clerk. Legally, these requests do not meet the requirements for standing under the Texas Water Code, TCEQ's rules, or criteria establish in *Collins*. Procedurally, these requests fail to meet even the most basic requirements for "group or associational" standing, which is a decision that is fully under the jurisdiction of the three-member Texas Commission on Environmental Quality. Practically, and in accord with TCEQ's rules set forth in 30 TAC §55.205(b), the Applicant placed the protestants' attorneys on notice that as filed, the hearing request of Clean Water Action and Lone Star were insufficient to meet the legal burden imposed on persons protesting environmental permitting application (*See*

Letter to Lowerre & Frederick, marked as Applicant's **Exhibit 7**).<sup>28</sup> In the interest of preserving the integrity of the contested case hearing process, and in order to follow the law set forth in the Texas Water Code, the Commission should deny both hearing requests as a matter of law because they were not filed on behalf of an "affected person."

#### **IV. Analysis of Issues that Should be Referred to SOAH**

In the alternative, should the Commission find that one or more of the hearing requests were indeed filed on behalf of an affected person, Issue Nos. 1 - 11 as set forth below were raised during the public comment period, and each Issue should be reviewed to determine if it involves a factual dispute that is relevant and material to the statutory and regulatory requirements of this permit application. Additionally, there must be a nexus between the issues referred for hearing and the purpose of the organization(s) determined to have legal standing. Even if an association has sufficient standing to trigger a hearing, the scope of such hearing should not include any issue that is not germane to the association's purpose (e.g., localized air emissions, nuisance odors, etc.). Because the two associations have not complied with the TCEQ's requirements governing hearing requests and associational standing (as discussed above), it is not possible at this time to determine whether a sufficient nexus exists between the following issues and the organization's purpose. Hence, not all of the following issues are necessarily appropriate for remand to SOAH.

1. Whether the facility will violate water quality standards in Segment 1226 of the Brazos River Basin?

The proposed facility is seeking a TCEQ-issued water quality permit for expanding an existing dairy operation. The ED has determined that the Applicant meets the statutory and regulatory requirements for this operation.<sup>29</sup> Even though the law and the conditions of the permit prohibit the discharge of pollutants (except under a 25-year, 10-day rainfall event) into Segment 1226 of the Brazos River Basin, this is a factually disputed issue and could be referred to SOAH if properly raised by a party granted a hearing.

2. Whether the permit is inconsistent with the Total Maximum Daily Load (TMDL) for the North Bosque River Watershed?

The TCEQ, in conjunction with the Texas State Soil and Water Conservation Board (TSSWCB) drafted the TMDL for the North Bosque River Watershed to achieve pollutant reductions in the North Bosque and Upper North Bosque River Watersheds. According to the TMDL, it "addresses all aspects of dairy or animal feeding operation facilities as components of non-point source loading."<sup>30</sup> Moreover, the TMDL noted that authorized point source discharges from animal feeding operations will support water quality standards. The two organizations are generally challenging the agency's authority to issue amended permits to dairies in the North

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<sup>28</sup> A permit applicant may request that a group or association provide an explanation of how the group or association meets the "standing requirements" set forth in TCEQ's rules. See 30 TAC §55.205(b).

<sup>29</sup> See ED's Amended Response to Comment, p. 3.

<sup>30</sup> See *An Implementation Plan for Soluble Reactive Phosphorus in the North Bosque River Watershed*, pp. 6 (December 2002).

Bosque River Watershed. Issuance of a permit to the Applicant is consistent with the TMDL for the North Bosque River Watershed, which is a question of law or policy and not a disputed factual issue; therefore, this issue is not referable to SOAH.

3. Whether the TCEQ should suspend their consideration of the application because of the unavailability of documents consisting of the current Pollution Prevention Plan, the Comprehensive Nutrient Management Plan, the Retention Control Structure Management Plan and the Nutrient Management Plan for third party application fields?

The scope of any water quality permit application does not include a consideration of issues involving "other documents" that either were not required to be part of the permit application or that will be drafted, completed, reviewed and certified at some point in the future. Clean Water Action and Lone Star do not understand, appreciate or agree that the water quality permitting process is a matter beyond the scope of any disputed fact. A challenge to the agency's established permitting process is at best a question of law or policy previously decided by the Commissioners when they adopted the regulations under which the current application was processed. These organizations did not challenge the agency's rules, and the issue is neither relevant nor material to the decision on the current application. This should not be referred to SOAH.

4. Whether the TCEQ's legal basis for issuing the permit would adequately protect against pathogens that might harm human health and safety?

The law and the conditions of the permit require the facility to operate in a manner that prevents the creation of a nuisance, including situations that have the potential to be an instrument of disease transmission to a person or between persons.<sup>31</sup> The RTC issued by the ED accurately explained the law concerning situations where "numeric effluent limitations are infeasible" for chronic rainfall events that exceed a 25-year, 10-day storm event, and concluded that it is impractical to develop and apply numeric effluent limitations to infrequent, highly variable potential discharges associated with confined animal feeding operations (CAFOs).<sup>32</sup> As noted by Lone Star, "federal law requires that permitting authorities exercise their best professional judgment to establish effluent limitations on a case-by-case basis in permit cases." The TCEQ has determined as a matter of policy that the permitting requirements imposed on dairies for the control of other constituents (e.g., nutrients) are sufficient to control possible pathogens. Therefore, this issue is a question of law or policy for determination by the Commission, rather than a factually disputed issue that is material and relevant to this case. This issue should not be referred to SOAH.

5. Whether there were any specific technical deficiencies in the application related to the following:
  - a) Phosphorus production as set forth in ED's RTC Response No. 13;

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<sup>31</sup> See 30 TAC §321.43(i)(A); See also, TEXAS HEALTH & SAFETY CODE §341.011(5).

<sup>32</sup> See ED's RTC, Response 12, pp. 14-15.

- b) Phosphorus reduction as set forth in ED's RTC Response No. 14;
- c) Sludge monitoring as set forth in ED's RTC Response No. 15;
- d) Wastewater and slurry sampling as set forth in ED's RTC Response No. 16;
- e) Nitrogen application rates as set forth in ED's RTC Response No. 17;
- f) Nutrient Utilization Plans (NUP) and Nutrient Management Plans (NMP) as set forth in ED's Response NO. 19; and
- g) Control of Third Party Application Fields in ED's RTC Response No. 20.

**Phosphorous** - Issues 5(a) and 5(b) concern the rates of phosphorus production and reduction; neither of these issues is materially or factually relevant to this permit application. Moreover, neither of these issues would personally affect anyone working, frequenting or residing in close proximity to this facility. These issues concern a legal and technical requirement of the permitting process; therefore, these issues are questions of law and should not be referred to SOAH.

**Sludge Volume** – Issue 5(c) concerns the monitoring of sludge volume in the RCSs and Lone Star notes that sludge measurements should be required “immediately after the permit is issued and annually, thereafter.” This issue is not factually disputed, is not material or relevant (as it would not affect anyone working, frequenting or residing in close proximity to the proposed facility) to the permit application. Similar to the issues raised concerning phosphorous, this issue concerns a legal requirement of the permitting process; therefore, this issue is a question of law and should not be referred to SOAH.

**Wastewater, Slurry Sampling and Nitrogen Application** – Issues 5(d) and 5(e) concern legally enforceable rules of the permitting process. This issue is not factually disputed, is not material or relevant (as it would not affect anyone working, frequenting or residing in close proximity to the proposed facility) to the permit application. This issue is a question of law and should not be referred to SOAH.

**NUPs, NMPs and Third Party Fields** – Issues 5(f) and 5(g) concern legally enforceable rules of the permitting process. This issue is not factually disputed, is not material or relevant (as it would not affect anyone working, frequenting or residing in close proximity to the proposed facility) to the permit application. This issue is a question of law and should not be referred to SOAH.

6. Whether the Applicant had an average compliance history at the time the permit application was filed?

Hidden View Dairy has a more than acceptable compliance history and has secured all necessary environmental permits to conduct current operations on-site. Although this issue is under the Commission's jurisdiction, and is usually relevant and material, there is no disputed

issue of fact raised. Therefore this issue should not be referred to SOAH. This issue was fully addressed in the ED's RTC.<sup>33</sup>

7. Whether the Applicant has satisfied the applicable odor control requirements, including the prevention of nuisance odor conditions?

Lone Star, alone, alleges that "the likelihood of excessive sludge buildup" in lagoons will contribute to odors and that the "lax regulation" of third-party application fields will increase the likelihood of odors. Both of those issues relate to potential future operational non-compliance by the Dairy, and neither issue is referable for hearing. Air quality issues for CAFOs and AFOs are a question of law and policy, which have already been decided by the Commission when it adopted, by rule, the Air Standard Permit for AFOs.<sup>34</sup> Additionally, the Commission Staff has already determined that the Dairy qualifies for "Option 1," under the Air Standard Permit (e.g. the Dairy is an existing operation constructed prior to August 19, 1998 and meets the one-quarter mile buffer) and no protestant has raised a disputed fact as to whether the Dairy *qualifies* for that coverage.

There is no right to a contested case hearing for "air standard permits" or "air permit by rules." In addition, TCEQ has already undertaken an extensive protectiveness review when the agency issued the Air Standard Permit, and concluded that no persons would be adversely affected so long as there was a ¼ mile buffer between the proposed facility and an occupied structure, such as a house. As a legal matter, in this case there are no homes or other "occupied structures" within a ¼ mile of the Dairy, which are not owned by the Dairy. Also, recall that in *Collins* the court upheld the Commission's denial of a hearing request by an owner of property located within 590 feet of an expanding animal feeding operation.

Furthermore, any claim that the facility cannot meet the air quality requirements is plainly not reasonable, as the Dairy is an established operation which has *not* had even so much as an *odor complaint* in the past five (5) years. The additional head of animals will not require any structural changes to the facility, other than the required increase in RCS capacity, so there is no structural change that could increase the potential for odor. Therefore, this issue should not be referred to SOAH because Lone Star has failed to allege or raise a referable issue (e.g. has not alleged that the Dairy does not *qualify* for the Air Standard Permit).

8. Whether the issuance of the permit will result in harm to health and safety of area residents and downstream water users?

The health and safety of area and downstream residents would normally be an issue that is under the jurisdiction of the Commission. However, in this case, the technical review of the permit application has already determined that the permit will not result in any threat to human health or the environment. Moreover, the draft permit contains provisions for larger and newer retention control structures, including the use of an RCS Management Plan, to reduce the potential for discharge into surface waters. In order to be referred to SOAH, the issue must be relevant and material to the decision on the application; in this case, this issue is too broad, has

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<sup>33</sup> ED's RTC, Response 7, p. 10.

<sup>34</sup> 30 TAC §321.43.

been fully addressed by the ED's RTC<sup>35</sup> and is unrelated to the specific facts of this permit application. This issue should not be referred to SOAH.

9. Whether the facility operation will result in algal blooms that will interfere with recreational use of all downstream waters?

TCEQ implements and enforces standards that are established to protect human health, safety, and the environment, and as noted, the draft permit contains provisions for larger RCSs and RCS management plans to reduce the potential for overflows resulting in discharges into surface waters. This permit would not authorize the discharge of "algal blooms" and it would not authorize the discharge of any substance that would be known to cause algal blooms. This issue is too broad, not material and relevant to the application and it should not be referred to SOAH.

10. Whether the issuance of the permit would degrade receiving waters, specifically for parameters including dissolved oxygen, in violation of the TCEQ's anti-degradation policy?

This issue of law was adequately addressed in the ED's RTC, which concluded that an anti-degradation analysis was performed and results were that permit is consistent with the requirements of the anti-degradation implementation procedures in 30 TAC § 307.5(c)(2)(G) of the Texas Surface Water Quality Standards. This issue should not be referred to SOAH.

11. Whether the construction and operation of the facility adversely impact migratory species?

This issue was raised by the U.S. Fish and Wildlife Service, the Nation's lead agency for protecting wildlife, under the context of the wintering range and migratory range of the bald eagle and the whooping crane, respectively. In response to the ED's RTC and through negotiations with the permit Application, the U.S. Fish and Wildlife submitted a letter dated January 9, 2007, stating that no further comments were warranted. Effectively, this action ended any factual dispute that would be material or relevant to this permit action. This issue should not be referred to SOAH.

#### **V. Maximum Expected Duration of the Contested Case Hearing**

The Applicant recommends the contested case hearing should last no longer than four months from the preliminary hearing to the proposal for decision.

#### **VI. Applicant's Recommendation**

The Applicant respectfully recommends the Commission:

- A. Find that there is no right to a hearing request in this matter because this is an amendment application that would not (1) *increase significantly the quantity of waste authorized*

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<sup>35</sup> ED's RTC, Response 9, p. 12.

to be discharged and would not (2) *change materially the pattern or place of discharge and the activity*, and issue TPDES Permit No. WQ0003197000 to the Applicant.

B. Find that both Lone Star and Clean Water Action have failed to demonstrate the requirements for associational standing, and deny both hearing requests.

C. If the Commission should find that either hearing request satisfies the requirements for associational standing, including the legal burden of proving that a member is an "affected person," then the Commission should:

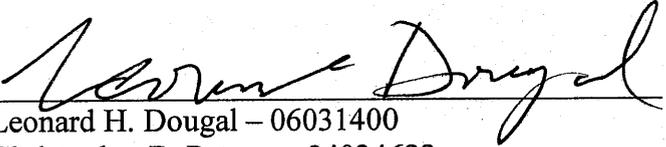
1. Refer only the following issue to SOAH: Issue No. 1 - Whether the facility will violate water quality standards in Segment 1226 of the Brazos River Basin?

2. Find the remaining issues (Issues No. 2-11) are either not relevant and material to the decision on this permit application, are fully subsumed within Issue No. 1 previously referred to hearing, and/or questions of law or policy best left to the jurisdiction of the Commission and not appropriately referred to SOAH.

3. Direct the maximum expected duration of the contested case hearing to be four months.

Respectfully submitted,

JACKSON WALKER L.L.P.  
100 Congress Avenue, Suite 1100  
Austin, Texas 78701  
Telephone: (512) 236-2000  
Facsimile: (512) 236-2002

  
Leonard H. Dougal – 06031400  
Christopher B. Pepper – 24034622

John J. Vay  
State Bar No. 20527700  
LAW OFFICES OF JOHN J. VAY  
1250 Capital of Texas Highway South  
Building three, Suite 400  
Austin, Texas 78746  
Telephone: (512) 329-2010  
Facsimile: (512) 329-2011

ATTORNEYS FOR HIDDEN VIEW DAIRY

**CERTIFICATE OF SERVICE**

I hereby certify that a true and copy of Applicant's Response to Hearing Requests has been forwarded to the following on the 30<sup>th</sup> day of July , 2007.

William De Jong  
Hidden View Dairy  
1684 Private road 1401  
Dublin, Texas 78446

Waco, Texas 76702-2570

The Robbins Family  
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Dublin, Texas 76446-7602

Norman Mullin, P.E.  
Enviro-Ag Engineering, Inc.  
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Amarillo, Texas 78124

Robert Brush (MC-173)  
Staff Attorney  
Environmental Law Division  
Texas Commission on Environmental Quality  
P. O. Box 13087  
Austin, Texas 78711-3087

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Eric Allmon  
Loweree & Frederick  
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Austin, Texas 78701-4386

Bridget Bohac (MC-108)  
Office of Public Assistance  
Texas Commission on Environmental Quality  
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Austin, Texas 78711-3087

Thomas J. Cloud, Jr.  
Field Supervisor  
U.S. Department of the Interior  
711 Stadium Drive, Suite 252  
Arlington, Texas 76011-6247

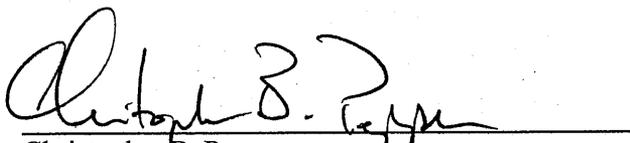
Helen Gilbert  
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Austin, Texas 78701-1670

Blas J. Coy, Jr. (MC-103)  
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City Manager  
City of Waco  
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Waco, Texas 76702-2570

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

Arthur Pertile  
City Attorney  
City of Waco  
P. O. Box 2570

  
\_\_\_\_\_  
Christopher B. Pepper

**EXHIBIT LIST TO APPLICANT'S RESPONSE TO HEARING REQUESTS**

Exhibit 1 – Photograph of Hidden View Dairy and adjacent land

Exhibit 2 - Adjacent Landowners Map (Figure 2.1)

Exhibit 3 – Area Land Use Map (Figure 9.1)

Exhibit 4 – Settlement Agreement

Exhibit 5 – US EPA letter dated January 9,2007

Exhibit 6 – Fish and Wildlife Service letter dated January 9, 2007

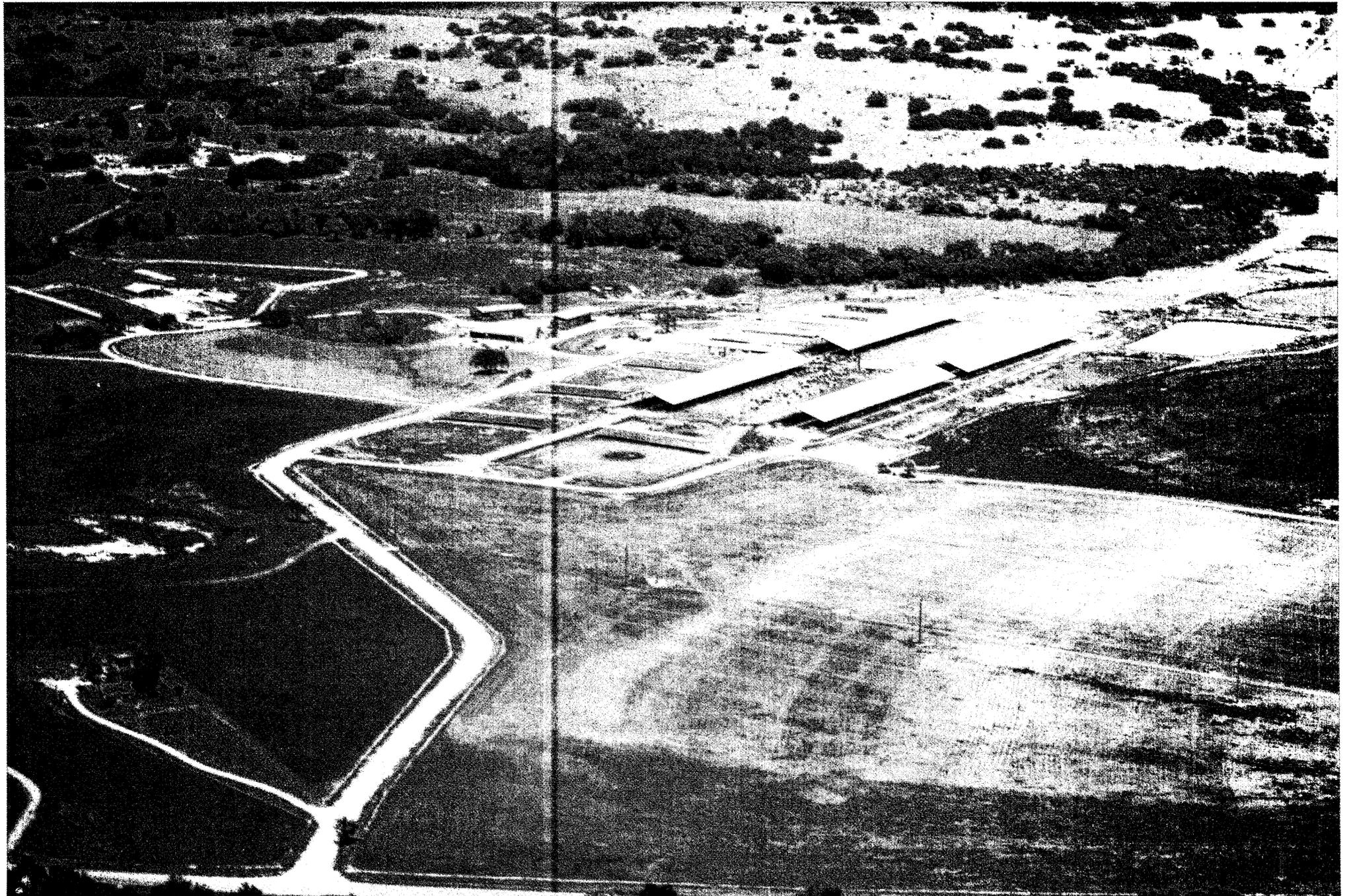
Exhibit 7 - Letter to Lowerre & Frederick dated June 29, 2007

Exhibit 8 – Compliance history report from TCEQ

Exhibit 9 – Awards

Exhibit 10 – Affidavit of Norman H. Mullins  
Exhibits A-E - Photographs

Exhibit 11 – TCEQ Letter dated April 26, 2007



**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**

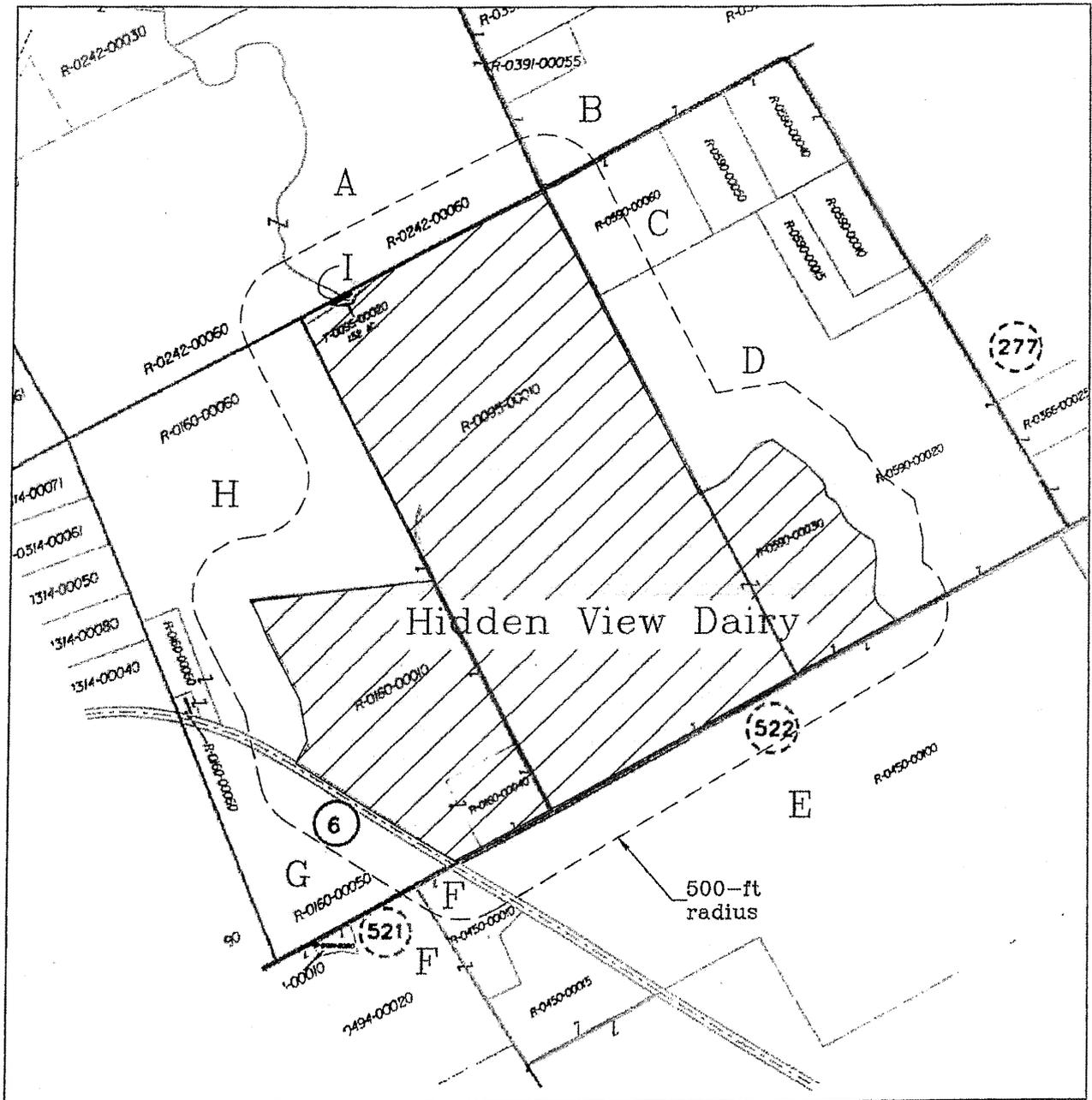
<b>Tract</b>	<b>Landowner Address</b>	<b>Geo ID/Legal Description</b>	<b>Acres</b>
<b>A</b>	Betty E Robbins (3/4 undivided interest) Carol J Robbins (1/8 undivided interest) Judith J Robbins (1/8 undivided interest) 1011 CR 520 Dublin TX 76446	R.0242.00060	251
<b>B</b>	Norman and Marjorie Massey Estate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

Property account information from the Erath County Appraisal District for the tracts owned by Hidden View Dairy to be operated as part of the CAFO is included in the supporting documentation of the application.

Received

04-17-06

Erath County Appraisal District  
Appraisal Office



NO SCALE

Source: Erath County Appraisal District.

HIDDEN VIEW DAIRY  
DUBLIN, TEXAS  
ERATH COUNTY

ADJACENT LANDOWNERS MAP  
FIGURE 2.1  
PAGE 5 REVISED 2/15/2005

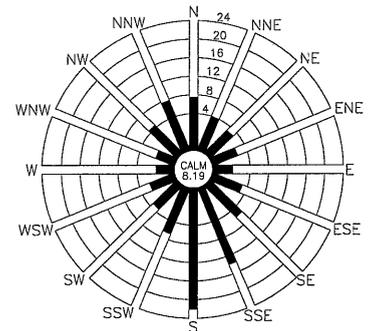
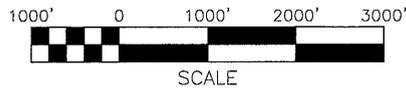


Enviro-Ag Engineering, Inc.  
ENGINEERING CONSULTANTS  
702 QUAIL CREEK DRIVE  
AMARILLO, TEXAS 79124  
TEL (806) 353-8123 FAX (806) 353-4132



**Legend:**

- Denotes Occupied Structure
- ⊠ Denotes Residence Owned by Applicant



MAP SOURCE:  
 TOPO! NATIONAL GEOGRAPHIC SEAMLESS TOPOGRAPHIC  
 QUADRANGLE MAPS, 2002. DUBLIN AND ALEXANDER QUADRANGLES,  
 EAE SITE VISIT, 2004, MAP GENERATED APR 14, 2006, USDA-FSA  
 AERIAL PHOTO, 2004.

ANNUAL WIND ROSE  
 LOCATION: STEPHENVILLE, TEXAS  
 PERIOD OF RECORD: 1984 - 1992  
 SOURCE: TCEQ WINDROSE DATA

HIDDEN VIEW DAIRY  
 DUBLIN, TEXAS  
 ERATH COUNTY

AREA LAND USE MAP  
 FIGURE 9.1  
 PAGE 54 REVISED 8/9/06



Enviro-Ag Engineering, Inc.  
 ENGINEERING CONSULTANTS  
 702 QUAIL CREEK DRIVE  
 AMARILLO, TEXAS 79124  
 TEL (806) 353-6123 FAX (806) 353-4132

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION

**FILED**  
JAN 11 2008

THE CITY OF WACO §  
VS. §  
DENNIS SCHOUTEN, et al. §

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY  
CIVIL ACTION NO. W-08-2118 LERK

*Jonashe*  
1:43 a.m.

**SETTLEMENT AGREEMENT**

"Plaintiff," whenever used herein, shall mean the City of Waco, its employees, elected officials, legal representatives, agents and servants. "Defendants," whenever used herein, shall mean Golden Star Dairy, Robert J. Schouten, Pete Henry Schouten, Pieter Bakker, Bill Schouten Dairy, Tex-S, L.L.C., Bill Schouten, Pete Schouten, M.D. Schouten, AzTex Dairy, Inc., Fred R. Lueck, Sr., Judy A. Lueck, Hidden View Dairy, William N. Dejong, William C. Dejong, Tony Beltman, Scenic Ridge Dairy, Schouten Dairy, Dennis Schouten, Cornelius T. Schouten, Nicholas Schouten, Joan Schouten, Nancy Schouten, and Linda Schouten and any of their successors, predecessors, assigns and former and present subsidiaries, parents, divisions, affiliates, officers, directors, employees, legal representatives, insurers in their capacities as insurers of Defendants, agents and servants.

**RECITALS**

A lawsuit was brought by Plaintiff against Defendants, wherein Plaintiff has asserted certain claims and causes of action against the Defendants under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), the federal Clean Water Act, the Texas Solid Waste Disposal Act, and under state common law for action for negligence, negligence per se and trespass.

Defendants have denied liability;

In order to avoid further time, expense and uncertainties of litigation, Plaintiff and

Defendants desire to enter into a final compromise and settlement of any and all claims which Plaintiff may have against Defendants relating to water quality in Lake Waco or the North Bosque River watershed.

#### TERMS AND CONDITIONS OF THE AGREEMENT

Therefore, in order to settle the current dispute and litigation among them, Plaintiff and Defendants agree as follows:

1. Within three (3) days after the date the last party signs this Settlement Agreement (the "Agreement"), the parties shall file a joint motion to dismiss this proceeding, in the form attached hereto as Appendix B. The parties agree that this Court shall have continuing exclusive jurisdiction to resolve any disputes under the Agreement.
2. Plaintiff agrees not to oppose, directly or indirectly, the issuance of any of Defendants' pending permit applications as submitted to the Texas Commission on Environmental Quality ("TCEQ") and postmarked as of November 1, 2005, through such actions as public comments, requesting a contested case hearing or seeking any form of administrative or judicial review of the permits.
3. Plaintiff and Defendants hereby release any existing claims or causes of action they may have against the other relating to operation of their farms or the filing of this lawsuit including, without limitation, any claims for injunctive relief, damages, response costs, or attorneys' or consultants' fees.
4. Until the end of the Sampling Period (as defined in Section 8 below) the parties shall not initiate any legal proceeding against the other except to enforce the Agreement.

5. Defendants shall not amend any currently pending permit applications except for non-substantive changes to correct technical deficiencies; provided, however, that Dennis Schouten may submit a request for permit amendment to increase his permitted herd size from 650 to 999 head.

6. Defendants shall haul out 50 pounds of solid manure per cow per day above the number of currently permitted cows in the watershed. This manure shall be transported offsite to a TCEQ-permitted composting facility, other lawful waste reclamation or processing facility or for beneficial use outside of the North Bosque River watershed. Each dairy shall submit quarterly reports to the court setting out: 1) the weight by load of solid manure, if any, hauled off the dairy during the prior quarter under the provisions of the Agreement, including under the provisions of Sections 3 and 8 of Appendix A hereto, each dairy will provide to Plaintiff, upon written request, copies of weight tickets for each load referenced in any report, and 2) the total number and type of all cows on the dairy as reported to each dairy's lender(s) (or as of reporting date if no lender report was made). All reports required to be submitted to the court shall be contemporaneously provided by Defendants to Plaintiff. There will be no lab test for moisture content required. Compliance with these haul off requirements will be determined on a quarterly basis. The Defendants may identify, when necessary, if weather conditions during a given quarter make compliance impossible. A Defendant will not be able to claim this impossibility exception if any solid manure from the Defendant's dairy has been applied to any land in the North Bosque River Watershed during the quarter. Even if a Defendant is granted an exception to the haul off requirement in a particular quarter, the dairy is still required to comply with the haul off requirements as set out in this Section and in Sections 3 and 8 of the Appendix on an annual basis. "Solid manure" shall mean a combination of feces and urine excreted by dairy cows with no moisture added.

7. If, as of June 1, 2008, the water quality determination is satisfactory, as described in Section 8 below, then the Parties' obligations under the Agreement shall terminate, except for the agreement not to oppose pending permit applications referred to in Sections 2 and 5, the release referred to in Section 3, and the removal agreement referred to in Section 6. The provisions of the removal agreement in Section 6 shall terminate on June 1, 2013, which is five years after the end of the Sampling Period.

If, as of June 1, 2008, the water quality determination is not satisfactory, as described in Section 8 below, then each Defendant shall comply with the conditions specified in Appendix A of this Agreement and each defendant shall include the conditions specified in Appendix A in its Pollution Prevention Plan.

8. The water quality determination shall be based on the sampling at Valley Mills for Soluble Reactive Phosphorus ("SRP") by persons and methodology mutually agreeable to the Parties during storm events for the period between June 1, 2006, through June 1, 2008 (the "Sampling Period"). The water quality determination will be considered satisfactory if the mean concentration of SRP of the samples collected during the sampling period is equal to or less than 0.0397 mg/l. Any dispute relating to sampling, sampling methodology or whether the water quality determination is satisfactory as that term is described herein will be determined by Magistrate Judge Jeffrey Manske for the United States District Court for the Western District of Texas, Waco Division or, if Judge Manske is not available, by the United States District Judge for the United States District Court for the Western District of Texas, Waco Division.

In order to arrive at the methodology to make the water quality determination described above, the parties shall confer, through their attorneys' of record or other designated

representatives, on or before Tuesday, February 28, 2006, to draft an agreed sampling protocol. In the event the parties cannot agree, Plaintiff and Defendants shall provide to each other a proposed sampling protocol on or before March 9, 2006. In the event the parties are unable to reach an agreement regarding a sampling protocol by March 23, 2006, the parties will notify the Court of such lack of agreement, and the Court will conduct a hearing within fourteen days of receipt of such notice, and upon reviewing the proposed sampling protocols of each side and, if necessary, hearing evidence on the issues, the Court will issue a binding sampling protocol within fourteen days of the hearing. This protocol shall be implemented beginning June 1, 2006, for a period of two years.

9. The terms of this Agreement are contractual and not mere recitals. It is understood that this Agreement will be governed by Texas law. The parties agree that the terms of this settlement will be kept confidential and not disclosed to any person other than the parties identified herein, absent approval from all other parties herein.

10. This Agreement contains the entire agreement between the parties, and any promise or agreement not contained or expressed herein has not been made and shall not be recognized

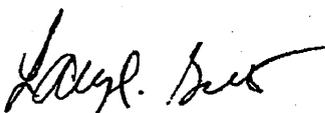
11. To facilitate execution, this Agreement may be executed in as many counterparts as may be required; and it shall not be necessary that the signature of each party appear on each counterpart; but it shall be sufficient that the signature of each party appear on one or more of the counterparts. All counterparts shall collectively constitute a single Agreement.

12. The parties further agree to draft a mutually agreeable joint press release to be issued on or before January 31, 2006, which will merely identify the fact that the case has been settled and shall not disclose any specific terms of the settlement. In the event the parties are unable to reach an agreement about the terms of said press release, the parties will submit alternative versions of a joint

press release to be selected by Magistrate Judge Jeffrey Manske or, if Judge Manske is not available, by the United States Judge for the United States District Court for the Western District of Texas, Waco Division.

It is understood that the Appendix A attached herewith is a part of the Agreement and that the parties will be bound thereto just as they are bound to all other components of the Agreement.

For the City of Waco, Texas:

By:   
 Larry Groth  
City Manager,  
City of Waco

Date: 1/11/06

For Defendants:

By: Raymond White - Attorney Date: 1/11/06  
Robert J. Schouten, Individually and on behalf of Golden Star Dairy

Robert J. Schouten 1/13/06

By: Pete Henry Schouten Date: 1-11-06  
Pete Henry Schouten

By: Raymond White - Attorney Date: 1/11/06  
Pieter Bakker

For Defendants:

By: Raymond E. White - Attorney Date: 1/11/06  
Robert J. Schouten, Individually and on behalf of Golden Star Dairy

By: Pete Henry Schouten Date: 1-11-06  
Pete Henry Schouten

By: Raymond E. White - Attorney Date: 1/11/06  
Pieter Bakker

P. Bakker

1/11/06

X Bill Schouten

By: Raymond White-Allen Date: 1/11/06  
Bill Schouten, Individually and on behalf of  
Bill Schouten Dairy and Tex-S, L.L.C.

By: Pete Schouten Date: 1-11-06  
Pete Schouten

By: M.D. Schouten Date: 1/11/06  
M.D. Schouten

By: Fred R. Lueck Sr. Date: 1-11-06  
Fred R. Lueck, Sr., Individually and  
on behalf of AzTex Dairy, Inc.

By: Judy A. Lueck Date: 1-11-06  
Judy A. Lueck  
*Judy A. Lueck*

By: William N. Dejong Date: 1-11-06  
William N. Dejong, Individually and on behalf of Hidden View Dairy

By: William C. Dejong <sup>WITH PERMISSION  
HVD</sup> Date: 1-11-06  
William C. Dejong

*William C. Dejong*

By: J. Beltman Atty Date: 1-11-06  
Tony Beltman Individually and on behalf of  
Scenic Ridge Dairy

Tony Beltman 1-11-06

X Dennis Schouten  
By: Dennis Schouten by attorney Russell & G Date: 1/11/2006  
Dennis Schouten, Individually and on behalf of Schouten Dairy

X Cornelius Schouten  
By: Cornelius Schouten by attorney Russell & G Date: 1/11/2006  
Cornelius T. Schouten

X Nicholas Schouten  
By: Nicholas Schouten by attorney Russell & G Date: 1/11/2006  
Nicholas Schouten

X Joan Schouten  
By: Joan Schouten by atty, Russell & G Date: 1/11/2006  
Joan Schouten

X Nancy Schouten  
By: Nancy Schouten by Abby Russell & G Date: 1/11/2006  
Nancy Schouten

X Linda Schouten  
By: Linda Schouten by atty, Russell & G Date: 1/11/2006  
Linda Schouten

X \_\_\_\_\_ by attorney Russell G  
By: Dennis Schouten Date: 1/11/2006  
Dennis Schouten, Individually and on behalf of Schouten Dairy

X \_\_\_\_\_ by attorney Russell G  
By: Cornelius Schouten Date: 1/11/2006  
Cornelius T. Schouten

X \_\_\_\_\_ by attorney Russell G  
By: Nicholas Schouten Date: 1/10/2006  
Nicholas Schouten

X \_\_\_\_\_ by attorney Russell G  
By: Joan Schouten Date: 1/11/2006  
Joan Schouten

X \_\_\_\_\_ by attorney Russell G  
By: Nancy Schouten Date: 1/11/2006  
Nancy Schouten

X \_\_\_\_\_ by attorney Russell G  
By: Linda Schouten Date: 1/11/2006  
Linda Schouten

X ~~Dennis Schouten~~  
 By: Dennis Schouten by Attorney Russell & G Date: 1/11/2006  
 Dennis Schouten, Individually and on behalf of Schouten Dairy

X ~~Cornelius Schouten~~  
 By: Cornelius Schouten by Attorney Russell & G Date: 1/11/2006  
 Cornelius T. Schouten

X ~~Nicholas Schouten~~  
 By: Nicholas Schouten by Attorney Russell & G Date: 1/12/06  
 Nicholas Schouten

X ~~Joan Schouten~~  
 By: Joan Schouten by Attorney Russell & G Date: 1/11/2006  
 Joan Schouten

X ~~Nancy Schouten~~  
 By: Nancy Schouten by Attorney Russell & G Date: 1/11/2006  
 Nancy Schouten

X ~~Linda Schouten~~  
 By: Linda Schouten by Attorney Russell & G Date: 1/11/2006  
 Linda Schouten

## Appendix A

1. Each Defendant shall permit Plaintiff and its representative(s) access to and the right to observe soil sampling and lagoon sampling required in accordance with their permit and applicable TCEQ and EPA Regulations or conducted by TCEQ, EPA or other state or federal agencies on the Concentrated Animal Feeding Operations ("CAFO"), any Land Management Unit identified in their permit, and any land not owned or operated by Defendant on which waste or wastewater from the dairy has been applied or will be applied ("Third-Party Fields") during the term of this Agreement. The Defendant shall provide Plaintiff at least ten (10) days advance actual notice of soil sampling and lagoon sampling activities. Any analysis of samples covered by this paragraph shall be performed at a lab on a list that is mutually agreed upon.
2. Defendants are prohibited from using 30 TAC Section 321.42 (c)(2) (relating to the use of the SPAW model) as an option for satisfying the margin of safety requirements of applicable TCEQ regulations.
3. Each Defendant shall remove from its farm at least 20 pounds of solid manure per day per cow, and 100% of sludge or other solids collected or removed from any Retention Control Structure, attributable to the number of cows on site in the watershed up to the total number of cows authorized in permits in effect on November 1, 2005, and this manure shall be transported offsite to a TCEQ-permitted composting facility, other lawful waste reclamation or processing facility, or for beneficial use outside the North Bosque River Watershed. Reporting shall be provided as required in Section 6 of the Agreement. "Solid manure" shall mean a combination of feces and urine excreted by dairy cows with no moisture added.
4. Defendants shall reduce the phosphorus diet for all cattle to 0.4% P or less, unless based on the recommendation of an animal nutritionist, a Defendant and Plaintiff both agree that modification of this requirement is appropriate for the health of one or more cattle.
5. For fields (LMUs) that tested in excess of 200 ppm phosphorus in the most recent soil samples, the Defendant may apply wastewater to those fields in accordance with a phosphorus reduction schedule that accomplishes a 10 ppm annual reduction with a 20% variance. The schedule shall continue until the field tests 200 ppm or below. If any field rises above 200 ppm at anytime, it shall again be required to comply with the terms of this Section 5 of Appendix A.
6. Defendants' Retention Control Structures ("RCS") shall be sized, maintained, and operated to contain the 25-year, 10-day rainfall event for the area and that such RCSs will be constructed pursuant to the requirements of their revised permits and verified by current RPE certification based on physical measurements within no more than 180 days of certification, with update for each permit renewal.

7. Each Defendant shall annually submit to TCEQ a report to include all relevant information regarding waste and wastewater application and disposal, including monthly pounds/gallons of waste and wastewater:

- \* applied to LMUs (specifically identified);
- \* applied to third party fields (specifically identified);
- \* delivered to composting facilities (specifically identified);
- \* other specifically identified sites and processes.

8. The number of cows kept by each Defendant may not exceed the number authorized in the Defendant's permits applicable at the date of the last party to sign this Agreement unless the Defendant removes at least 50 pounds of solid manure per day for each cow as provided in Section 6 of the Settlement Agreement. "Solid manure" shall mean a combination of feces and urine excreted by dairy cows with no moisture added.

9. Upon any sale, transfer, assignment or other conveyance by a Defendant of a CAFO permit, either 1) the provisions of the Settlement Agreement shall be assumed by the new owner of the permit, or 2) the then existing permit of the Defendant shall be terminated and any new owner will be subject to a new permitting process if applicable.

10. All obligations under the Settlement Agreement and this Appendix A, with the exception of Section 3 of the Settlement Agreement, will terminate on June 1, 2013, being 5 years after the end of the Sampling Period.



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

**REGION 6  
1445 ROSS AVENUE  
DALLAS, TEXAS 75202-2733**

**JAN 09 2007**

CERTIFIED MAIL: RETURN RECEIPT REQUESTED (7004 1160 0003 0354 7236)

Mr. Chris Linendoll, E.I.T., Manager  
Wastewater Permitting Section (MC-148)  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, TX 78711-3087

Re: No Objection  
TPDES Permit No. TX0120197  
Texas State Permit No. 03197  
Hidden View Dairy  
Dublin, TX 76446

Dear Mr. Linendoll:

Thank you for the opportunity to review the draft proposed permit transmitted in the letter from Mr. Charles Maguire (TCEQ) to Ms. Evelyn Rosborough (EPA) dated November 22, 2006, and received on November 27, 2006. As a result of our review, we conclude that the draft proposed permit appears to conform to the guidelines and requirements of the Clean Water Act. Therefore, EPA has no objection to this draft permit.

Thank you for your cooperation. If I may be of assistance in helping your office achieve its permitting goals, please call me at 214-665-7170 or have your staff contact Kilty Baskin at VOICE:214-665-7500, FAX:214-665-2191, or EMAIL:baskin.kilty@epa.gov.

Sincerely yours,

Original signed by

Claudia V. Hosch  
Chief  
NPDES Permits Branch

cc: Ms. Deanna Moore, Land Application Team  
Wastewater Permitting Section (MC 148)  
TCEQ  
P.O. Box 13087  
Austin, Texas 78711-3087



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

Ecological Services  
WinSystems Center Building  
711 Stadium Drive, Suite 252  
Arlington, Texas 76011

*AGR*  
*37581*

January 9, 2007

OPA

JAN 12 2007

BY *RG*

CHIEF CLERK'S OFFICE

JAN 12 AM 11:17

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Ms. LaDonna Castañuela  
Office of the Chief Clerk, MC 105  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: U.S. Fish and Wildlife Service review of proposed Texas Pollutants Discharge Elimination System Permit No. 03197

Dear Ms. Castañuela:

On January 8, 2007, the U.S. Fish and Wildlife Service (Service) Arlington, Texas, field office contacted Mr. Norman Mullin, Hidden View Dairy representative, concerning the renewal of Texas Pollutants Discharge Elimination System (TPDES) Permit No. 03197 for a concentrated animal feeding operation (CAFO) in Erath County, Texas. Mr. Mullin stated that this facility would initiate a migratory bird monitoring program (maintaining a logbook is optional) and would verbally contact the Service's Arlington field office within 24-hours in the event that effects to federal trust resources were detected. Based on this information, no further comments by the Service regarding this permit renewal are warranted.

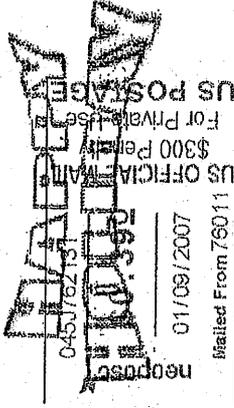
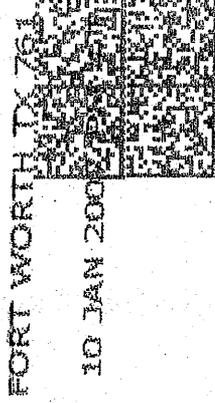
Thank you for allowing the Service an opportunity to review and comment on this permit. If you have any questions concerning this matter, please contact Jacob Lewis of my staff at (817) 277-1100.

Sincerely,

Thomas J. Cloud, Jr.  
Field Supervisor

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
FISH AND WILDLIFE SERVICE  
711 STADIUM DRIVE, SUITE 252  
ARLINGTON, TX 76011

OFFICIAL BUSINESS  
PENALTY FOR PRIVATE USE, \$300



Ms. LaDonna Castañuela  
Office of the Chief Clerk, MC 105  
Texas Natural Resource Conservation  
Commission  
P.O. Box-13087  
Austin, TX 78711-3087

RECEIVED  
JAN 12 2007  
MAIL CENTER

78711-3087



## Compliance History

Customer/Respondent/Owner-Operator:	CN602586737    Hidden View Dairy	Classification: AVERAGE	Rating: 12.43
Regulated Entity:	RN102819562    HIDDEN VIEW DAIRY	Classification: AVERAGE	Site Rating: 12.43
ID Number(s):	WASTEWATER AGRICULTURE	PERMIT	WQ0003197000
	WASTEWATER AGRICULTURE	EPA ID	TX0120197
	WASTEWATER AGRICULTURE	REGISTRATION	TXG015304
	WATER QUALITY NON PERMITTED	ID NUMBER	R04AG0012
	PETROLEUM STORAGE TANK REGISTRATION	REGISTRATION	77538
Location:	The facility is located on the NW side of CR 522 approx one quarter mile NE of the intersectionn of CR 522 and HWY 6 in Erath County		Rating Date: 9/1/2006 Repeat Violator: NO
TCEQ Region:	REGION 04 - DFW METROPLEX		
Date Compliance History Prepared:	June 25, 2007		
Agency Decision Requiring Compliance History:	Enforcement		
Compliance Period:	September 01, 2001 to August 31, 2006		

TCEQ Staff Member to Contact for Additional Information Regarding this Compliance History

Name: Jimmy Perry Phone: 239-0766

### Site Compliance History Components

1. Has the site been in existence and/or operation for the full five year compliance period? Yes
2. Has there been a (known) change in ownership of the site during the compliance period? Yes
3. If Yes, who is the current owner? Hidden View Dairy
4. If Yes, who was/were the prior owner(s)? N/A
5. When did the change(s) in ownership occur? N/A

### Components (Multimedia) for the Site :

- A. Final Enforcement Orders, court judgements, and consent decrees of the state of Texas and the federal government.

Effective Date: 06/03/2002	ADMINORDER 2001-0774-MWD-E
Classification: Moderate	
Citation: 30 TAC Chapter 321, SubChapter K 321.181(a)	
TWC Chapter 26 26.121	
Rqmt Prov: V PERMIT	
Description: Failed to prevent tailwater and stormwater runoff from discharging into an unlined impoundment, resulting in the discharge of stormwater and wastewater from an unlined impoundment, resulting in the discharge of stormwater and wastewater.	
Classification: Moderate	
Citation: 30 TAC Chapter 321, SubChapter B 321.39(f)(19)(A)	
TWC Chapter 26 26.121	
Description: Failed to prevent a discharge of pollutants into or adjacent to waters in the state through irrigation management practices that prevent the discharge or drainage of irrigated wastewater.	

- B. Any criminal convictions of the state of Texas and the federal government.

N/A

- C. Chronic excessive emissions events.

N/A

- D. The approval dates of investigations. (CCEDS Inv. Track. No.)

- |   |            |          |
|---|------------|----------|
| 1 | 08/22/2002 | (8951)   |
| 2 | 05/23/2003 | (436466) |
| 3 | 06/18/2003 | (33802)  |
| 4 | 02/03/2004 | (259600) |
| 5 | 07/29/2005 | (400720) |
| 6 | 12/14/2005 | (434971) |

- E. Written notices of violations (NOV). (CCEDS Inv. Track. No.)

- F. Environmental audits.

Notice of Intent Date: 10/28/2002 (33105)

Disclosure Date: 04/23/2003

Viol. Classification: Moderate

Citation: 30 TAC Chapter 321, SubChapter B

Description: Failed to design, construct, and operate retention control facility #3 to contain all process generated wastewaters and the contaminated runoff from a 25-year, 24-hour rainfall event for the location of the point source.

G. Type of environmental management systems (EMSs).

N/A

H. Voluntary on-site compliance assessment dates.

N/A

I. Participation in a voluntary pollution reduction program.

N/A

J. Early compliance.

N/A

Sites Outside of Texas

N/A

SELECT MILK  
PRODUCERS



Quality Awards

2nd PLACE

*Hidden View Dairy*

2003

SELECT MILK  
PRODUCERS



Quality Awards

1st PLACE

*Hidden View Dairy*

2004

SELECT MILK  
PRODUCERS



Quality Awards

1ST PLACE

*Hidden View Dairy*

2005

**AFFIDAVIT OF NORMAN H. MULLIN, P.E.**

STATE OF TEXAS

§  
§  
§

COUNTY OF Randall

BEFORE ME, the undersigned authority, personally appeared Norman H. Mullin, an individual personally known to me, who, after being duly sworn, testified upon his oath as follows:

1. My name is Norman H. Mullin. I am over 21 years of age and of sound mind. I have never been convicted of a felony, and I am fully competent to make this Affidavit. All of the matters testified to herein are true and correct and within my personal knowledge.

2. I have been licensed as a professional engineer in the State of Texas since 1989 and am the Owner and President of Enviro-Ag Engineering, Inc., which is an agricultural engineering firm based in Amarillo, Texas that has 23 employees. I hold a Bachelor of Science degree in Agricultural Engineering from Texas Tech University (1982).

3. In my professional work I am regularly involved in the permitting, design, construction, operation and regulatory compliance of animal feeding operations (AFOs) and concentrated animal feeding operations (CAFOs), including dairy facilities. I have worked with such operations since at least 1992. I have been involved in the design and environmental permitting of more than 200 animal feeding operations, including dairy operations similar to those contemplated by application for TPDES Permit No. WQ0003197000 (the "Application").

4. I am the person who supervised the preparation of the Application and am responsible for the technical and design information. I have worked on the Hidden View Dairy, including the subject matter of the Application, since 2001. I routinely visit the site and am personally familiar with the regulated facilities on-site and the surrounding land uses.

5. It is my professional opinion that the Application, which would authorize an additional 1,000 animals to be added to current dairy operations, would ensure that the dairy is operated in a manner that is more protective of the environment than that required by the current "registration" for the following reasons:

- a) The Application would expand the Retention Control Structures (RCSs) to a combined capacity of 79.6 acre-feet, which is approximately 26.2 acre-feet greater than existing capacity. The Application would require that the RCSs' design volume be certified by a professional engineer and the storage levels be maintained in strict adherence to an RCS Management Plan.

- b) The buffer distances between the land application and production facilities to surface water would be expanded, thus reducing the potential for discharge.
- c) In accordance with the facility's NRCS/TSSWCB approved Comprehensive Nutrient Management Plan (CNMP), all land application of manure, and wastewater will adhere to the phosphorus-based nutrient management plan, which will ensure that phosphorous application will occur according to NRCS Practice Code 590 containing a phosphorous risk index, cropping schemes and realistic yield goals.
- d) The third party land application of manure and wastewater shall not exceed the nitrogen crop requirement when soil phosphorous concentration in Zone 1 is less than or equal to 50 ppm phosphorous, or; application rates shall not exceed two times the phosphorous crop removal rate when soil phosphorous concentration in Zone 1 is greater than 50 ppm and less than or equal to 150 ppm phosphorous, or; land application rates shall not exceed one times the phosphorous crop removal rate when soil phosphorous concentration in Zone 1 is greater than 150 ppm and less than 200 ppm phosphorous, and; no application of manure or wastewater if the soil phosphorous concentration is greater than 200 ppm.

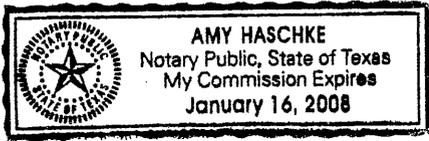
6. In my visits to the Hidden View Dairy, I have observed the land use adjacent to and in close proximity to the Dairy and it consists exclusively of rural, agricultural activities, including farming, cattle ranching, and other livestock operations.

7. It is my professional opinion that all efforts have been initiated to minimize the odor potential, for all waste generated by dairy cattle on-site is collected and removed to areas away from the dairy facility. As shown in Exhibit A, manure is collected by a vacuum operated "scraping system" on a routine schedule. As shown in Exhibits B and C, the scraping system is effective in removing most of the manure. Further, as shown in Exhibits D and E, waste water from the retention control structures (RCSs) is beneficially irrigated on crops.

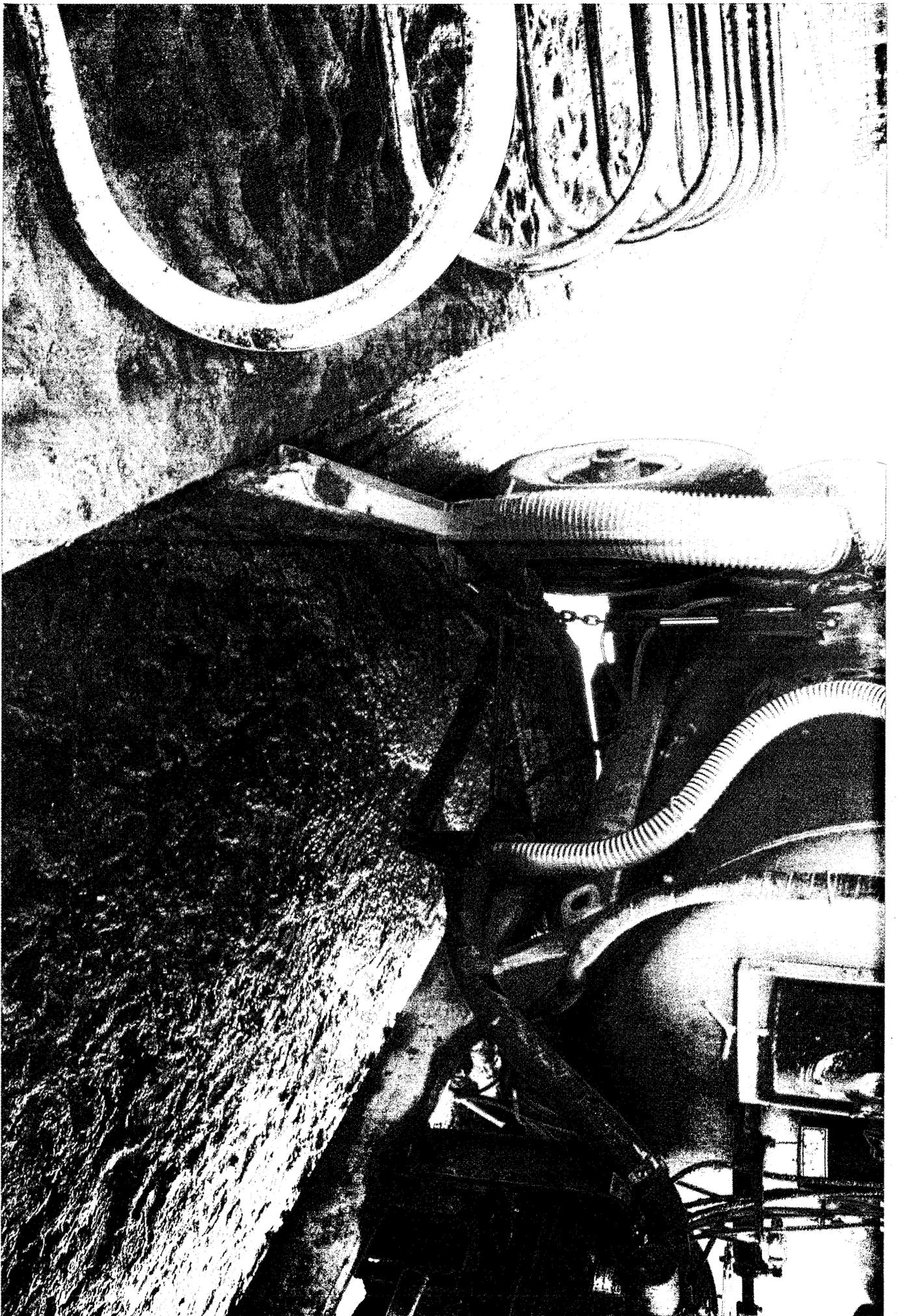
FURTHER AFFIANT SAYETH NOT.

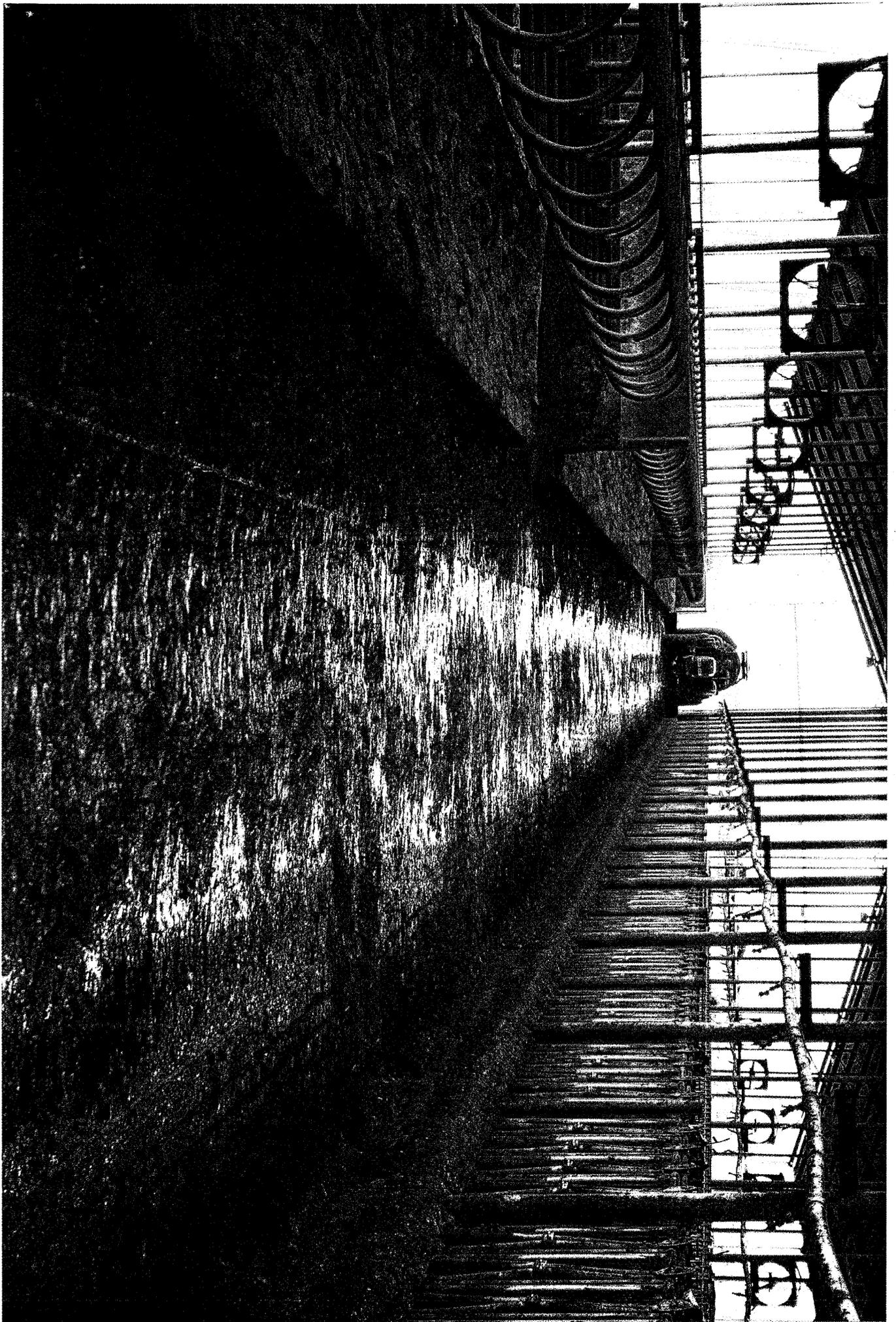
  
\_\_\_\_\_  
Norman H. Mullin, P.E.

SUBSCRIBED AND SWORN TO before me this 27 day of July 2007, to certify which witness my official hand and seal of office.

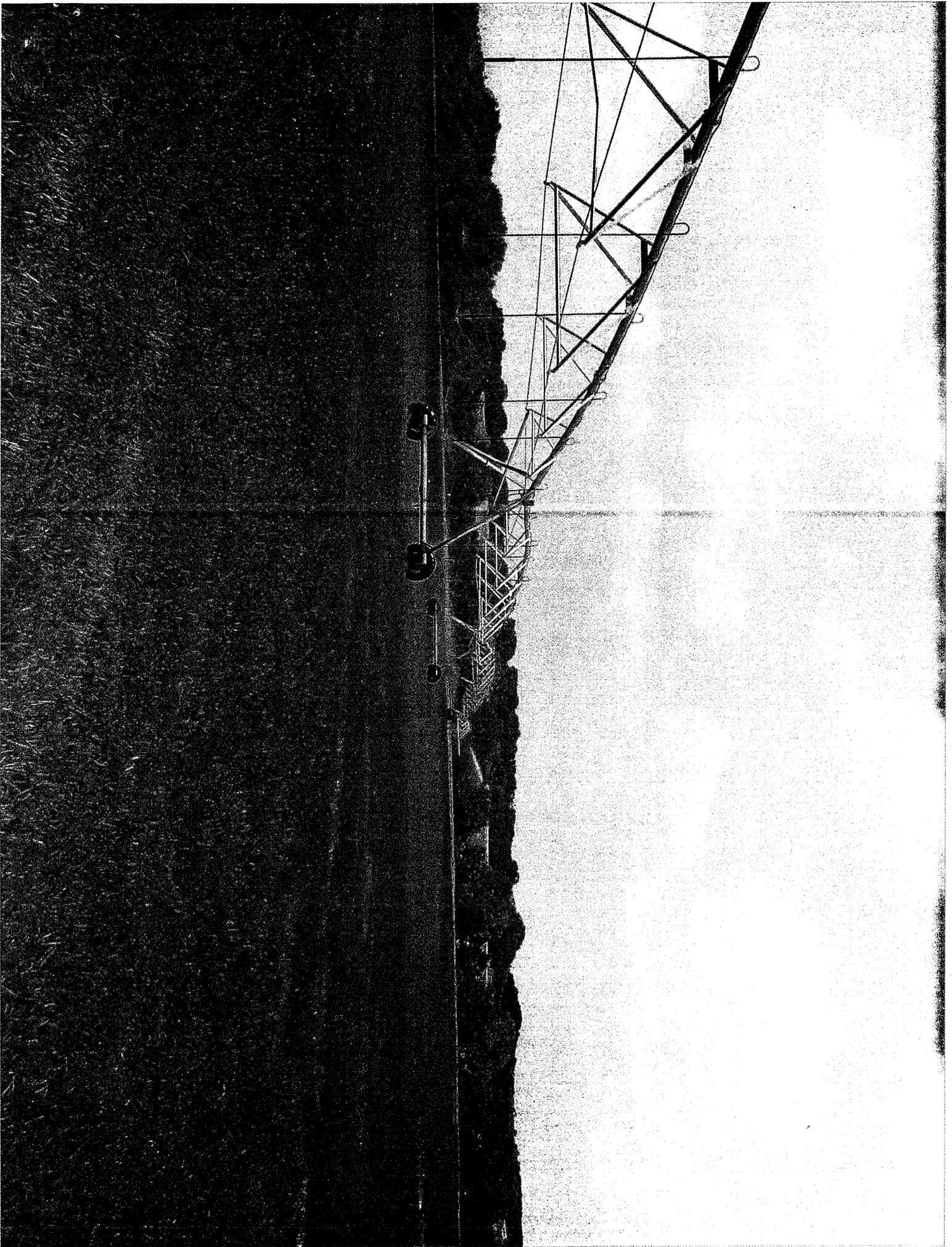


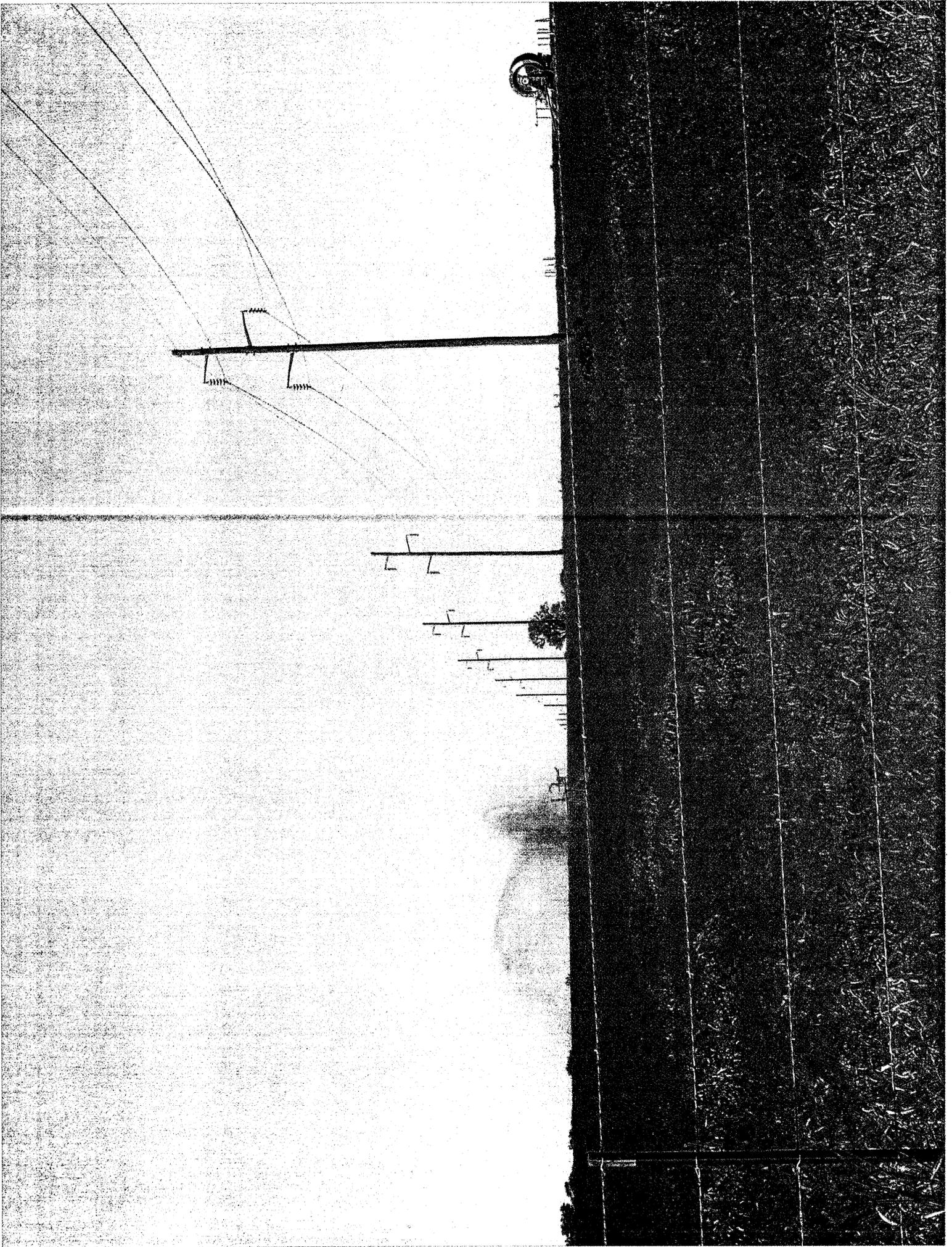
*Amy Haschke*  
\_\_\_\_\_  
Notary Public - State of Texas











Kathleen Hartnett White, *Chairman*  
Larry R. Soward, *Commissioner*  
H. S. Buddy Garcia, *Commissioner*  
Glenn Shankle, *Executive Director*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 26, 2007

TO: Persons on the attached mailing list.

RE: Hidden View Dairy, a Texas General Partnership  
TPDES Permit No. WQ0003197000

### **Decision of the Executive Director.**

The executive director has made a decision that the above-referenced permit application meets the requirements of applicable law. **This decision does not authorize construction or operation of any proposed facilities.** Unless a timely request for contested case hearing or reconsideration is received (see below), the TCEQ executive director will act on the application and issue the permit.

Enclosed with this letter is a copy of the Executive Director's Response to Comments. A copy of the complete application, draft permit and related documents, including public comments, is available for review at the TCEQ Central office. A copy of the complete application, the draft permit, and executive director's preliminary decision are available for viewing and copying at the Erath County Extension Office, 112 West College Street, Courthouse Annex Room 109, Stephenville, Texas 76401.

If you disagree with the executive director's decision, and you believe you are an "affected person" as defined below, you may request a contested case hearing. In addition, anyone may request reconsideration of the executive director's decision. A brief description of the procedures for these two requests follows.

### **How To Request a Contested Case Hearing.**

It is important that your request include all the information that supports your right to a contested case hearing. You must demonstrate that you meet the applicable legal requirements to have your hearing request granted. The commission's consideration of your request will be based on the information you provide.

The request must include the following:

- (1) Your name, address, daytime telephone number, and, if possible, a fax number.
- (2) If the request is made by a group or association, the request must identify:
  - (A) one person by name, address, daytime telephone number, and, if possible, the fax number, of the person who will be responsible for receiving all communications and documents for the group; and
  - (B) one or more members of the group that would otherwise have standing to request a hearing in their own right. The interests the group seeks to protect must relate to the organization's purpose. Neither the claim asserted nor the relief requested must require the participation of the individual members in the case.
- (3) The name of the applicant, the permit number and other numbers listed above so that your request may be processed properly.
- (4) A statement clearly expressing that you are requesting a contested case hearing. For example, the following statement would be sufficient: "I request a contested case hearing."

Your request must demonstrate that you are an **"affected person."** An affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. Your request must describe how and why you would be adversely affected by the proposed facility or activity in a manner not common to the general public. For example, to the extent your request is based on these concerns, you should describe the likely impact on your health, safety, or uses of your property which may be adversely affected by the proposed facility or activities. To demonstrate that you have a personal justiciable interest, you must state, as specifically as you are able, your location and the distance between your location and the proposed facility or activities.

Your request must raise disputed issues of fact that are relevant and material to the commission's decision on this application. The request must be based on issues that were raised during the comment period. The request cannot be based solely on issues raised in comments that have been withdrawn. The enclosed Response to Comments will allow you to determine the issues that were raised during the comment period and whether all comments raising an issue have been withdrawn. The public comments filed for this application are available for review and copying at the Chief Clerk's office at the address below.

To facilitate the commission's determination of the number and scope of issues to be referred to hearing, you should: 1) specify any of the executive director's responses to comments that you dispute; and 2) the factual basis of the dispute. In addition, you should list, to the extent possible, any disputed issues of law or policy.

### **How To Request Reconsideration of the Executive Director's Decision.**

Unlike a request for a contested case hearing, anyone may request reconsideration of the executive director's decision. A request for reconsideration should contain your name, address, daytime phone number, and, if possible, your fax number. The request must state that you are requesting reconsideration of the executive director's decision, and must explain why you believe the decision should be reconsidered.

### **Deadline for Submitting Requests.**

A request for a contested case hearing or reconsideration of the executive director's decision must be in writing and must be **received** by the Chief Clerk's office no later than **30 calendar days** after the date of this letter: You should submit your request to the following address:

LaDonna Castañuela, Chief Clerk  
TCEQ, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087

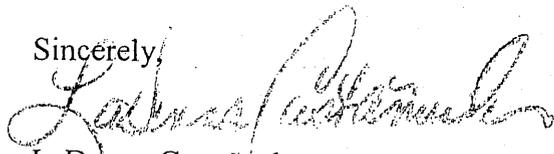
### **Processing of Requests.**

Timely requests for a contested case hearing or for reconsideration of the executive director's decision will be referred to the alternative dispute resolution director and set on the agenda of one of the commission's regularly scheduled meetings. Additional instructions explaining these procedures will be sent to the attached mailing list when this meeting has been scheduled.

### **How to Obtain Additional Information.**

If you have any questions or need additional information about the procedures described in this letter, please call the Office of Public Assistance, Toll Free, at 1-800-687-4040.

Sincerely,



LaDonna Castañuela  
Chief Clerk

LDC/cz

Enclosures

MAILING LIST  
for  
Hidden View Dairy, a Texas General Partnership  
TPDES Permit No. WQ0003197000

FOR THE APPLICANT:

William De Jong  
Hidden View Dairy  
1684 Private Road 1401  
Dublin, Texas 76446

Norman Mullin, P.E.  
Enviro-Ag Engineering, Inc.  
702 Quail Creek Drive  
Amarillo, Texas 79124

Rick Webb  
Enviro-Ag Engineering, Inc.  
19677 US Highway 377  
Dublin, Texas 76446

PROTESTANTS/INTERESTED PERSONS:

See attached list.

FOR THE EXECUTIVE DIRECTOR:

Robert Brush, Staff Attorney  
Texas Commission on Environmental Quality  
Environmental Law Division MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087

James Moore, Technical Staff  
Texas Commission on Environmental Quality  
Water Quality Division MC-148  
P.O. Box 13087  
Austin, Texas 78711-3087

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director  
Texas Commission on Environmental Quality  
Office of Public Assistance MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087

FOR PUBLIC INTEREST COUNSEL:

Blas J. Coy, Jr., Attorney  
Texas Commission on Environmental Quality  
Public Interest Counsel MC-103  
P.O. Box 13087  
Austin, Texas 78711-3087

FOR THE CHIEF CLERK:

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

ERIC ALLMON  
LOWERRE & FREDERICK  
44 EAST AVE STE 100  
AUSTIN TX 78701-4386

THOMAS J CLOUD JR FIELD SUPERVISOR  
US DEPT OF THE INTERIOR  
STE 252  
711 STADIUM DR  
ARLINGTON TX 76011-6247

HELEN GILBERT ESQ  
POTTS & REILLY LLP  
STE 850  
401 W 15TH ST  
AUSTIN TX 78701-1670

LARRY D GROTH CITY MANAGER  
CITY OF WACO  
PO BOX 2570  
WACO TX 76702-2570

ARTHUR PERTILE CITY ATTY  
CITY OF WACO  
PO BOX 2570  
WACO TX 76702-2570

THE ROBBINS FAMILY  
1011 COUNTY ROAD 520  
DUBLIN TX 76446-7602