

*LAGK*  
*37581*

**LOWERRE & FREDERICK**  
ATTORNEYS AT LAW  
44 East Avenue, Suite 100  
Austin, Texas 78701  
(512) 469-6000 • (512) 482-9346 (facsimile)  
Mail@LF-LawFirm.com

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
JAN 18 PM 2:31  
CHIEF CLERK'S OFFICE

January 18, 2007

LaDonna Castañuela  
Office of the Chief Clerk, MC 105  
TCEQ  
P. O. Box 13087  
Austin, TX 78711-3087

OPA *H*  
JAN 19 2007  
BY                      *D*

Re: Application by Hidden View Dairy for  
TCEQ Water Quality Permit No. 03197  
Public Comments and Request for Contested Case Hearing

*WQ0003197000*

Dear Ms. Castañuela:

The Lone Star Chapter of the Sierra Club files these comments regarding the above-referenced application for authorization of an expanded confined animal feeding operation (CAFO). The Lone Star Chapter of the Sierra Club also requests a contested case hearing on each of the issues raised in these comments, including whether the proposed permit is consistent with the Implementation Plan for Soluble Reactive Phosphorus in the North Bosque Watershed, and whether construction and operation of the facility and associated third-party application fields will have an adverse impact on surface water quality.

**I. INTRODUCTION**

The draft permit proposed by the Executive Director of the Texas Commission on Environmental Quality will only aggravate the environmental damage that has been inflicted on the North Bosque River. The draft permit is so inadequate that its issuance would constitute a violation of federal law. The draft permit also contains numerous technical deficiencies and inconsistencies.

**II. THE FIRST RULE OF HOLES - QUIT DIGGING**

The facility is proposed to be located in the drainage area of the North Bosque River in Segment 1226 of the Brazos River Basin. This segment has been recognized as out of compliance for state water quality standards regarding algal growth and bacteria. TCEQ has acknowledged that, "water quality concerns in the North Bosque River watershed are

*mcw*

largely associated with animal feeding operations.”<sup>1</sup> Phosphorus has been identified as the pollutant most directly responsible for algal blooms in this river. Waste from Confined Animal Feeding Operations (CAFOs) in the watershed is also largely responsible for the bacteria problems in the river. Quite simply, the proliferation of CAFOs in the North Bosque River watershed has dug TCEQ into a huge hole with regard to any attempts to meet water quality standards for algal growth and bacteria.

Federal law imposes a simple requirement when a state finds itself in such a hole – quit digging. More specifically, the state may not issue a permit to a new source or a new discharger into a water body that is already in violation of applicable standards unless it can be shown that the new source or discharger will not contribute to the violation of water quality standards. The expansion of the Hidden View Dairy constitutes a “new source” or “new discharger” under federal law. Under 40 CFR § 122.4(a) and § 122.4(d), TCEQ is effectively forbidden from issuing a permit to a new source or a new discharger unless it can be shown that the conditions of the permit will ensure compliance with state water quality standards.<sup>2</sup> Federal Regulations at 40 CFR § 122.4(i), establish the exclusive method by which this demonstration can be made for the issuance of a permit to a new source or a new discharger when the receiving water is already in violation of the water quality standards. A demonstration must be made, prior to the close of the public comment period, that sufficient remaining pollutant load allocations in the receiving waterbody exist for the discharge, and other dischargers into the waterbody are subject to a compliance schedule that will bring the waterbody into compliance with applicable water quality standards.

TCEQ has made some efforts at evaluating the impact of the phosphorus in the North Bosque River, developing a Total Maximum Daily Load (TMDL) evaluation through a stakeholder process. The allocation of this load to individual sources within the watershed has not been performed as required by federal law prior to the issuance of additional permits, however. Certainly, no demonstration has been made that sufficient load allocations still exist to justify issuing the proposed permit. With regard to bacteria, no attempt has been made to assess the appropriate total load for the North Bosque Watershed that would preserve the state water quality standard for that parameter. Apart from the violation of federal law that results from TCEQ’s failure to ensure that adequate load allocations exist to ensure that the water quality standard for algal growth will be met, the TCEQ’s failure to ensure that adequate load allocations are available to ensure that the water quality standard for bacteria will be met is also a violation of federal law. Sources of contaminants that will contribute these violations include not only the on-site and off-site application fields, but also the retention control structures at the site.

### III. THE PROPOSED PERMIT UNDERMINES IMPLEMENTATION OF THE TOTAL MAXIMUM DAILY LOAD DEVELOPED FOR THE NORTH BOSQUE RIVER WATERSHED

<sup>1</sup> IMPLEMENTATION PLAN FOR SOLUBLE REACTIVE PHOSPHORUS IN THE NORTH BOSQUE WATERSHED FOR SEGMENTS 1226 AND 1255, TCEQ and Texas State Soil and Water Conservation Board, December 2002.

<sup>2</sup> See also 40 CFR § 122.44(d).

In recognition of the existing water quality problems in the North Bosque River, TCEQ in coordination with the State Soil and Water Conservation Board has previously set about to evaluate the phosphorus pollution of the River and develop a plan to address that pollution. Part of this plan included the formulation of an area-wide total maximum daily load (TMDL) for phosphorus inputs into the North Bosque River. Issuance of the proposed permit would defy the assumptions made in the TMDL, and actively undermine implementation of the plan developed to address phosphorus pollution in the North Bosque River. Although the ED has asserted that the measures in the permit will ensure attainment of the water quality standards and implement the TMDL, there is no technical analysis that would support these statements. It is difficult to find any evidence in the draft permit that the ED has considered the TMDL at all.

A. The Permit Compromises the Validity of Assumptions Underlying the TMDL for Phosphorus

The proposed permit undermines each of the following assumptions made in formulating the TMDL:

<b>TMDL Assumption</b>	<b>Contrary Permit Allowance</b>
40,450 Dairy Cows in Watershed	Allows 1000 head increase with no offsetting decrease at another facility.
50% of solid manure from 40,450 dairy cows would be removed from watershed.	No manure from any of the 3000 cows at the facility is required to be removed from watershed
Phosphorus in the diet of permitted cows would be limited to 0.4%	No limit on phosphorus in diet of 3000 cows
Waste application on existing fields would be limited so that Phosphorus never exceeds 200 ppm	Waste may be applied on four existing fields already with phosphorus concentrations over 200 ppm
Waste application rate would be limited to phosphorus needs of the crop	Phosphorus may be applied well in excess of phosphorus needs on fields with phosphorus levels under 200ppm
Initial Phosphorus on new fields would be 60 ppm, and could not exceed this level	Phosphorus may be applied to new third-party fields at well over phosphorus needs until soil phosphorus levels reach 150 ppm.

Several other factors will also undermine these assumptions. There is no requirement for soil sampling of third-party fields prior to the initial application of waste, and no sampling at all is required for a full year after application begins. Thus, before even the first sample is analyzed on these fields the overapplication of phosphorus may already have produced soil phosphorus levels well in excess of any limit ostensibly established by the draft permit.

Significantly, the permit does not require a plan to *reduce* the soil phosphorus levels in any on-site field until the phosphorus concentration reaches 500 ppm. With on-site fields

allowed to reach a level of 500 ppm before any remedial action is taken, and off-site fields likely to quickly reach soil phosphorus levels of 200 ppm, the proposed permit amendment is likely to result in significantly increased phosphorus runoff into the North Bosque River.

In this manner, issuance of the draft permit would greatly undermine any effort by TCEQ to attain surface water quality standards in the North Bosque River. The draft permit clearly demonstrates that TCEQ has no commitment whatsoever to actually attaining the reductions in phosphorus loading set forth in the TMDL for the North Bosque River. TCEQ's willingness to so flagrantly disregard the conclusions of the TMDL developed through an extensive stakeholder process discourages the public from participating in future stakeholder processes, since stakeholder input apparently has little discernable impact on TCEQ's ultimate decisions.

#### B. Contrary to the TMDL, the Draft Permit Discourages Composting or Export of Dairy Waste

In summarizing efforts to reduce the impact of dairy waste on the North Bosque River, the TMDL states that, "the basic goal of this strategy is to remove from the North Bosque Watershed approximately 50% of the manure produced by dairies[.]"<sup>3</sup> The permit issued to the Hidden View facility in 1997 contained adequate protections on the application of manure to fields so that a significant quantity of the manure produced by the facility would leave the watershed unless it was composted. Instead of imposing conditions to encourage the export of manure from the watershed, the proposed permit actively encourages the operator to *avoid* such export by allowing the extensive use of third-party fields with little, if any, regard for whether necessary controls on nutrient application will be applicable to those fields. Considering the vastly expanded use of third-party fields allowed by the new permit, the ED's assertion that the proposed permit is more stringent than the existing permit is simply not true.

### IV. UNAVAILABILITY OF DOCUMENTS

The federal courts have made it clear that the plans controlling the operation of a CAFO are an integral part of the permit for the facility, and an evaluation of the sufficiency of those plans must consequently be part of the permitting process.<sup>4</sup> Operation of the proposed facility will be governed by a variety of plans, including a Comprehensive Nutrient Management Plan (CNMP), nutrient utilization plans (NUPs), a Pollution Prevention Plan (PPP) and the Retention Control Structure (RCS) management plans, as well as nutrient management plans that should be required for third-party application fields. The requirements of each of these plans will be federally-enforceable elements of the permit for the facility. Thus, each of these plans must be evaluated by TCEQ during the permitting process, and available to the public throughout the public comment period. Yet, not all of these have been available to the public. In fact, not all of these plans *even exist*. This allows the applicant to conveniently avoid all public scrutiny

<sup>3</sup> TMDL doc at p. 14.

<sup>4</sup> See *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005).

of these plans that are themselves key elements of the applicable permit. Allowing the applicant to delay the development and approval of such plans until after the permit is issued is analogous to allowing a landfill facility to delay the development of a site operating plan until after issuance of the permit. Such an approach is clearly not allowed in the municipal solid waste program.

TCEQ should suspend consideration of the permit application until Hidden View Dairy has submitted its current Pollution Prevention Plan, CNMP, and RCS management plan, as well as a nutrient management plan for each third-party application field where waste from the facility will be applied. The process should then be delayed until the public has been provided with a full opportunity to review these documents and provide comments to the agency regarding whether they sufficiently meet all applicable requirements.

## V. ABSENCE OF LIMITATIONS ADDRESSING PATHOGEN POLLUTION

The permit does not include adequate requirements to control pathogens and bacteria. Federal law requires that the permitting authority exercise its best professional judgment to establish technology-based effluent limitations on a case-by-case basis in issuing a permit in cases where no national effluent limitation has been implemented for a particular contaminant. The EPA has not yet issued a national effluent limitation for pathogens discharged from CAFOs, so this requirement applies to the processing of the permit amendment application by Hidden View Dairy. TCEQ, however, has not performed this required analysis and thus has not developed the appropriate effluent limitations to address pathogen discharges. A proper consideration of the permit in exercising this best professional judgment would involve an evaluation what Best Control Technology requirements should be included in consideration of the factors set out at 40 CFR § 125.3(d)(2). This failure to adequately protect against pathogen contamination of the receiving waters will result in harm to health and human safety if the permit amendment is issued.

## VI. TECHNICAL DEFICIENCIES

### A. Failure to Account for All Phosphorus Produced

At full operation, the facility is proposed to include 3000 cows producing 525 lb/day of Phosphorus altogether, or 438,821 lb/yr of  $P_2O_5$ .<sup>5</sup> Of this 438,821 pounds of  $P_2O_5$  produced each year, 8,661 pounds will be applied as wastewater to LMU Nos. 1,2,3,4,5 and 6.<sup>6</sup> 3,681 pounds of  $P_2O_5$  will be applied in the form of slurry to on-site land management units,<sup>7</sup> with the 184,953 pounds of  $P_2O_5$  contained in the remaining slurry being transferred to third-persons.

<sup>5</sup> Application p. 18 at Table 5.1.

<sup>6</sup> See Tables 5.3a-c, p. 21-23 of the application; & lab analysis dated 3/22/06.

<sup>7</sup> 35 lb/ac/yr  $P_2O_5$  on 15.2 acres at Field No. 3a + 39 lb/ac/yr  $P_2O_5$  on 21.1 acres at Field No. 4a + 47 lb/ac/yr  $P_2O_5$  on 49.5 acres at Field No. 7 = 3,681 lb/yr  $P_2O_5$

Considering the phosphorus produced at the facility, and all of the means included in the permit for dealing with this phosphorus, the following mass balance may be constructed:

438,821 pounds  $P_2O_5$  produced yearly  
- 8,661 pounds  $P_2O_5$  applied yearly to LMUs as wastewater  
- 3,681 pounds  $P_2O_5$  applied yearly to LMUs as slurry  
- 184,953 pounds  $P_2O_5$  transferred to third-persons yearly as slurry.  
**241,526 pounds  $P_2O_5$  Unaccounted For**

In this manner, the application, and the permit, simply ignores over *half* of the phosphorus that will be produced by the facility each year, and fails to include any plan *at all* for how this phosphorus will be dealt with. It is impossible to conclude that the facility will not adversely impact water quality when the Applicant has provided no evidence to either the public, or the TCEQ, regarding the measures that will prevent this unaccounted for phosphorus from impacting water quality.

## B. Inadequate Monitoring and Sampling

### 1. Lagoon Capacity

The draft permit requires that Hidden View Dairy measure the sludge volume in the existing lagoons for the first time three years after permit issuance. Of course, sludge will be produced during the intervening period, and it is no less important that the facility have adequate volume for the sludge produced during the initial three years of operation than after that time. Measurement of the sludge volume immediately upon permit issuance should be required, especially since a significant portion of that volume will likely be needed to handle the large quantity of phosphorus produced at the facility that is simply unaccounted for in the permit. At least annual measurement of sludge volume during the life of the permit should be required.

### 2. Sampling of Wastewater and Slurry

Even though the protection of the North Bosque River is heavily dependent on an adequate nutrient management plan, the entire nutrient management plan is allowed to be based on a single annual sample of the wastewater produced and a single annual sample of the slurry produced at the facility. This is not adequate sampling to provide a reliable basis for the development of a plan in which the public can have any confidence.

Not only is the use of a single sample flawed because it does not provide a statistically significant basis for evaluating the characteristics of the wastewater, but the wastewater sample is likely to underestimate the concentration of phosphorus in the wastewater, because such samples are normally taken near the surface of a wastewater holding lagoon. Yet, when wastewater is removed from the lagoons for land application, the sludge at the bottom of the lagoon is disturbed and combined with the exiting wastewater. This means that the phosphorus levels in the wastewater as applied will almost surely be higher than the phosphorus levels relied on in the single wastewater

sample used in developing the nutrient management plan. While the nutrient management plan may serve as a smokescreen to allow TCEQ and the Applicant to claim that they are protecting water quality in the North Bosque River, the reliance of that plan on statistically insignificant data that almost certainly fails to reflect contaminant levels actually applied to the fields renders that plan useless for all practical purposes in protecting the North Bosque River.

Samples of the wastewater being applied should be taken at least once during each irrigation event, and should be obtained from the irrigation pipeline apparatus at a sampling point located after the pump at the source lagoon.

#### 4. Regulation of Third-Party Fields

The meaning of the phrase "not exceed the nitrogen application rate" at paragraph VII.A.8(e)(4)(i)(C) of the permit is unclear. The term "nitrogen application rate" is not defined in the permit, nor is this term defined in TCEQ Chapter 321. To impose the appropriate limitation, and make this provision consistent with the remainder of the permit, this phrase should be replaced with "not to exceed the nitrogen crop removal rate."

The provisions applicable to the third party fields at paragraphs VII.A.8(e)(4)(D) & (E) also need to be revised to ensure that protections apply when the measured soil concentration equals the values of 50, 51, 150 and 151 ppm. As written, no requirements explicitly apply when phosphorus is present at these levels. The inclusion of language making it clear that requirements apply when a value is less than *or equal* to each of these values would resolve this problem.

The regulation of application to third-party fields as set forth at paragraphs VII.A.8(e)(4)(D) & (E) should also make it clear that the application rate is not to exceed the annual nitrogen crop removal rate where that value is more restrictive than the application rate that would be allowed in consideration of phosphorus only. These same sections should also address the relationship of the application rates to the requirements of NRCS Code 590. Language should be added to make clear that when the requirements of Code 590 are more strict than the requirements that would result from application of paragraphs VII.A.8(e)(4)(C)-(E), then the stricter limits of Code 590 apply. As written, the operator may claim that it can ignore the phosphorus index for the fields so long as the requirements of paragraphs VII.A.8(e)(4)(C)-(E) are met.

The permit also does not require that application on third-party fields be performed in accordance with a nutrient management plan developed for those fields. A nutrient management plan is necessary for the public to have any assurance that the nutrients are being applied in a protective manner. Nutrient management plans should be required for each of the third-party fields, and these plans should be available for review and approval during the permitting process for this expansion in accordance with the procedural requirements of the Clean Water Act. The same is true with regard to Nutrient Utilization Plans (NUP) at third-party fields. The protection of these fields requires that a NUP be developed in cases where the soil phosphorus level exceeds 200 ppm. For any

third-party field with existing nutrient concentrations over 200 ppm, a NUP must be developed and available for review and evaluation during the permitting process.

Above all, the Executive Director has not properly recognized that the third-party fields are land management units. A "land management unit" or "LMU" includes not only areas owned by a CAFO operator, but also any area *controlled* by the CAFO operator. 30 TAC § 321.32(25). It is clear from the application and the permit that Hidden View Dairy will exercise substantial control over the application of waste at the third-party fields. The Permit at paragraph VII.A.8(c) describes how the CAFO operator will control by contract the means of waste application and the quantity of waste application on the third party fields. Thus, these fields are properly considered "land management units," and should be subject to all regulatory requirements imposed on land management units under TCEQ Chapter 321. For this reason, TCEQ should require that the exact location and boundaries of these fields be identified in the permit application; that all waste application to these fields be in accordance with a NMP and CNMP; that all buffer requirements for LMUs be met; that no application occur during the nighttime; that facilities and equipment used at the fields be inspected weekly; and that all recordkeeping and reporting requirements of 40 CFR § 412.37 and 30 TAC § 321.46 be met.

Since phosphorus leaving third-party fields is no less harmful to the environment than phosphorus leaving on-site application fields, it makes no sense to make the conditions of nutrient application at these fields any less stringent than the conditions applicable to nutrient application on on-site fields. By establishing the precedent for the expanded use of third-party fields without applying adequate controls on the use of those fields, TCEQ is only further endangering water quality in the North Bosque River.

## VII. VIOLATION HISTORY

The Hidden View Dairy has been subject to an administrative order due to the failure of the facility to prevent the discharge of contaminants into waters in the state. It has also failed to follow applicable requirements for the construction and operation of the retention control structures on-site, and has failed to follow proper notice requirements in the course of applying for authorization, requiring the Commission to overturn the ED's approval of a previous major amendment application by the facility.<sup>8</sup> Considering the violation/compliance history of Hidden View Dairy, it is questionable whether Hidden View Dairy's current permit should be renewed, much less expanded:

## VIII. ODOR

The application also does not adequately address the increased odor that will result from the addition of 1000 cows to the facility. The likelihood of excessive sludge buildup in the on-site lagoons will contribute to odor, and the lax regulation of third-party

<sup>8</sup> See AN INTERIM ORDER concerning Motions to Overturn concerning the Executive Director's approval of the application by William DeJong dba Hidden View Dairy for a major amendment to TPDES Permit No. 03197; TNRCC Docket No. 2001-1121-AGR, signed November 29, 2001.

application fields also will increase the likelihood that odors will be emitted from these fields at levels that will result in a nuisance.

#### IX. HEALTH AND HUMAN SAFETY

Issuance of the permit amendment will result in harm to the health and safety of area residents. Downstream waters are used for drinking purposes by several persons and cities. Contamination from the facility will result in high levels of pathogens that will be harmful to the health of these persons, and harmful to the livestock of persons who use the North Bosque River as sources of drinking water for livestock.

#### X. IMPAIRMENT OF RECREATIONAL USES OF RECEIVING WATERS

The pollution of the North Bosque River will also impair the ability of persons to use downstream waters for recreational purposes. Impacts of the facility, including the increased algal blooms that will result from issuance of the amendment, will interfere with recreational uses of the waters.

#### XI. DEGRADATION OF RECEIVING WATERS

A proper anti-degradation analysis has not been performed with regard to the impact of the expanded facility on the quality of receiving waters. The quality of the receiving waters will be impaired by greater than a *de minimus* amount. It has not been established what amount of degradation would be considered *de minimus* for parameters such as dissolved oxygen, nor has the TCEQ accurately determined what impact issuance of the permit will have on levels of dissolved oxygen, and other parameters, in the receiving waters. The proposed expansion would violate the anti-degradation policy set forth in TCEQ rules and Texas Statute.

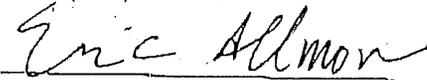
#### XII. CONCLUSION

For these reasons, TCEQ should deny Hidden View Dairy's application to expand its facility. The permitting process should not move forward until all information required by federal law to be provided to the public, including all plans that will govern operation of the facility, have been properly provided to both TCEQ and to the public. Due to the many deficiencies in the application, the Lone Star Chapter of the Sierra Club requests a contested case hearing regarding the application concerning each issue raised in these comments, as well as any issue raised in the comments provided to TCEQ by any other person, regardless of whether those comments are provided orally or in writing.

Respectfully Submitted,

**LOWERRE & FREDERICK**  
44 East Ave, Suite 100

Austin, TX 78701  
Tel. (512) 469-6000  
Fax (512) 482-9346



Eric Allmon  
State Bar No. 24031819

# LOWERRE & FREDERICK

44 East Avenue, Suite 100  
Austin, TX 78701  
(512) 469-6000 Phone  
(512) 482-9346 FAX

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2007 JAN 18 PM 2:31  
CHIEF CLERK'S OFFICE

## FAX COVER SHEET

### FAX NUMBER TRANSMITTED TO:

To: Chief Clerk, TCEQ 239-3311

From: Eric Allmon/Hanna Day-Woodruff

Date: January 18, 2007

DOCUMENTS	NUMBER OF PAGES (not including cover pg.)
Comments on Application by Hidden View Dairy for TCEQ Water Quality Permit No. 03197	10

**CONFIDENTIALITY NOTICE:** This message is intended for the use of the individual or entity to which it is addressed. This message consists of information from LOWERRE & FREDERICK and may be privileged, confidential and exempt from disclosure by law. Unauthorized distribution or copying of this information is prohibited. If you have received this communication in error, please notify us immediately at our telephone number listed above. We will promptly arrange for the return of the message to us.

PLEASE CALL 512.469.6000 AS SOON AS POSSIBLE IF ALL PAGES ARE NOT RECEIVED OR IF THERE ARE ANY OTHER PROBLEMS WITH THE TRANSMITTAL OF THIS FAX.

AGR  
37581

HR  
OPA

JAN 23 2007

LOWERRE & FREDERICK  
ATTORNEYS AT LAW  
44 East Avenue, Suite 100  
Austin, Texas 78701  
(512) 469-6000 • (512) 482-9346 (facsimile)  
Mail@LF-LawFirm.com

BY am

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2007 JAN 22 AM 11:38  
CHIEF CLERKS OFFICE

January 18, 2007

LaDonna Castañuela  
Office of the Chief Clerk, MC 105  
TCEQ  
P. O. Box 13087  
Austin, TX 78711-3087

Re: Application by Hidden View Dairy for  
TCEQ Water Quality Permit No. 03197  
Public Comments and Request for Contested Case Hearing

Dear Ms. Castañuela:

The Lone Star Chapter of the Sierra Club files these comments regarding the above-referenced application for authorization of an expanded confined animal feeding operation (CAFO). The Lone Star Chapter of the Sierra Club also requests a contested case hearing on each of the issues raised in these comments, including whether the proposed permit is consistent with the Implementation Plan for Soluble Reactive Phosphorus in the North Bosque Watershed, and whether construction and operation of the facility and associated third-party application fields will have an adverse impact on surface water quality.

**I. INTRODUCTION**

The draft permit proposed by the Executive Director of the Texas Commission on Environmental Quality will only aggravate the environmental damage that has been inflicted on the North Bosque River. The draft permit is so inadequate that its issuance would constitute a violation of federal law. The draft permit also contains numerous technical deficiencies and inconsistencies.

**II. THE FIRST RULE OF HOLES – QUIT DIGGING**

The facility is proposed to be located in the drainage area of the North Bosque River in Segment 1226 of the Brazos River Basin. This segment has been recognized as out of compliance for state water quality standards regarding algal growth and bacteria. TCEQ has acknowledged that, "water quality concerns in the North Bosque River watershed are

*Handwritten signature/initials*

largely associated with animal feeding operations.”<sup>1</sup> Phosphorus has been identified as the pollutant most directly responsible for algal blooms in this river. Waste from Confined Animal Feeding Operations (CAFOs) in the watershed is also largely responsible for the bacteria problems in the river. Quite simply, the proliferation of CAFOs in the North Bosque River watershed has dug TCEQ into a huge hole with regard to any attempts to meet water quality standards for algal growth and bacteria.

Federal law imposes a simple requirement when a state finds itself in such a hole – quit digging. More specifically, the state may not issue a permit to a new source or a new discharger into a water body that is already in violation of applicable standards unless it can be shown that the new source or discharger will not contribute to the violation of water quality standards. The expansion of the Hidden View Dairy constitutes a “new source” or “new discharger” under federal law. Under 40 CFR § 122.4(a) and § 122.4(d), TCEQ is effectively forbidden from issuing a permit to a new source or a new discharger unless it can be shown that the conditions of the permit will ensure compliance with state water quality standards.<sup>2</sup> Federal Regulations at 40 CFR § 122.4(i), establish the exclusive method by which this demonstration can be made for the issuance of a permit to a new source or a new discharger when the receiving water is already in violation of the water quality standards. A demonstration must be made, prior to the close of the public comment period, that sufficient remaining pollutant load allocations in the receiving waterbody exist for the discharge, and other dischargers into the waterbody are subject to a compliance schedule that will bring the waterbody into compliance with applicable water quality standards.

TCEQ has made some efforts at evaluating the impact of the phosphorus in the North Bosque River, developing a Total Maximum Daily Load (TMDL) evaluation through a stakeholder process. The allocation of this load to individual sources within the watershed has not been performed as required by federal law prior to the issuance of additional permits, however. Certainly, no demonstration has been made that sufficient load allocations still exist to justify issuing the proposed permit. With regard to bacteria, no attempt has been made to assess the appropriate total load for the North Bosque Watershed that would preserve the state water quality standard for that parameter. Apart from the violation of federal law that results from TCEQ’s failure to ensure that adequate load allocations exist to ensure that the water quality standard for algal growth will be met, the TCEQ’s failure to ensure that adequate load allocations are available to ensure that the water quality standard for bacteria will be met is also a violation of federal law. Sources of contaminants that will contribute these violations include not only the on-site and off-site application fields, but also the retention control structures at the site.

### **III. THE PROPOSED PERMIT UNDERMINES IMPLEMENTATION OF THE TOTAL MAXIMUM DAILY LOAD DEVELOPED FOR THE NORTH BOSQUE RIVER WATERSHED**

---

<sup>1</sup> IMPLEMENTATION PLAN FOR SOLUBLE REACTIVE PHOSPHORUS IN THE NORTH BOSQUE WATERSHED FOR SEGMENTS 1226 AND 1255, TCEQ and Texas State Soil and Water Conservation Board, December 2002.

<sup>2</sup> See also 40 CFR § 122.44(d).

In recognition of the existing water quality problems in the North Bosque River, TCEQ in coordination with the State Soil and Water Conservation Board has previously set about to evaluate the phosphorus pollution of the River and develop a plan to address that pollution. Part of this plan included the formulation of an area-wide total maximum daily load (TMDL) for phosphorus inputs into the North Bosque River. Issuance of the proposed permit would defy the assumptions made in the TMDL, and actively undermine implementation of the plan developed to address phosphorus pollution in the North Bosque River. Although the ED has asserted that the measures in the permit will ensure attainment of the water quality standards and implement the TMDL, there is no technical analysis that would support these statements. It is difficult to find any evidence in the draft permit that the ED has considered the TMDL at all.

A. The Permit Compromises the Validity of Assumptions Underlying the TMDL for Phosphorus

The proposed permit undermines each of the following assumptions made in formulating the TMDL:

<b>TMDL Assumption</b>	<b>Contrary Permit Allowance</b>
40,450 Dairy Cows in Watershed	Allows 1000 head increase with no offsetting decrease at another facility.
50% of solid manure from 40,450 dairy cows would be removed from watershed	No manure from any of the 3000 cows at the facility is required to be removed from watershed
Phosphorus in the diet of permitted cows would be limited to 0.4%	No limit on phosphorus in diet of 3000 cows
Waste application on existing fields would be limited so that Phosphorus never exceeds 200 ppm	Waste may be applied on four existing fields already with phosphorus concentrations over 200 ppm
Waste application rate would be limited to phosphorus needs of the crop	Phosphorus may be applied well in excess of phosphorus needs on fields with phosphorus levels under 200ppm
Initial Phosphorus on new fields would be 60 ppm, and could not exceed this level	Phosphorus may be applied to new third-party fields at well over phosphorus needs until soil phosphorus levels reach 150 ppm.

Several other factors will also undermine these assumptions. There is no requirement for soil sampling of third-party fields prior to the initial application of waste, and no sampling at all is required for a full year after application begins. Thus, before even the first sample is analyzed on these fields the overapplication of phosphorus may already have produced soil phosphorus levels well in excess of any limit ostensibly established by the draft permit.

Significantly, the permit does not require a plan to *reduce* the soil phosphorus levels in any on-site field until the phosphorus concentration reaches 500 ppm. With on-site fields

allowed to reach a level of 500 ppm before any remedial action is taken, and off-site fields likely to quickly reach soil phosphorus levels of 200 ppm, the proposed permit amendment is likely to result in significantly increased phosphorus runoff into the North Bosque River.

In this manner, issuance of the draft permit would greatly undermine any effort by TCEQ to attain surface water quality standards in the North Bosque River. The draft permit clearly demonstrates that TCEQ has no commitment whatsoever to actually attaining the reductions in phosphorus loading set forth in the TMDL for the North Bosque River. TCEQ's willingness to so flagrantly disregard the conclusions of the TMDL developed through an extensive stakeholder process discourages the public from participating in future stakeholder processes, since stakeholder input apparently has little discernable impact on TCEQ's ultimate decisions.

#### B. Contrary to the TMDL, the Draft Permit Discourages Composting or Export of Dairy Waste

In summarizing efforts to reduce the impact of dairy waste on the North Bosque River, the TMDL states that, "the basic goal of this strategy is to remove from the North Bosque Watershed approximately 50% of the manure produced by dairies[.]"<sup>3</sup> The permit issued to the Hidden View facility in 1997 contained adequate protections on the application of manure to fields so that a significant quantity of the manure produced by the facility would leave the watershed unless it was composted. Instead of imposing conditions to encourage the export of manure from the watershed, the proposed permit actively encourages the operator to *avoid* such export by allowing the extensive use of third-party fields with little, if any, regard for whether necessary controls on nutrient application will be applicable to those fields. Considering the vastly expanded use of third-party fields allowed by the new permit, the ED's assertion that the proposed permit is more stringent than the existing permit is simply not true.

### IV. UNAVAILABILITY OF DOCUMENTS

The federal courts have made it clear that the plans controlling the operation of a CAFO are an integral part of the permit for the facility, and an evaluation of the sufficiency of those plans must consequently be part of the permitting process.<sup>4</sup> Operation of the proposed facility will be governed by a variety of plans, including a Comprehensive Nutrient Management Plan (CNMP), nutrient utilization plans (NUPs), a Pollution Prevention Plan (PPP) and the Retention Control Structure (RCS) management plans, as well as nutrient management plans that should be required for third-party application fields. The requirements of each of these plans will be federally-enforceable elements of the permit for the facility. Thus, each of these plans must be evaluated by TCEQ during the permitting process, and available to the public throughout the public comment period. Yet, not all of these have been available to the public. In fact, not all of these plans *even exist*. This allows the applicant to conveniently avoid all public scrutiny

<sup>3</sup> TMDL doc at p. 14.

<sup>4</sup> See *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005).

of these plans that are themselves key elements of the applicable permit. Allowing the applicant to delay the development and approval of such plans until after the permit is issued is analogous to allowing a landfill facility to delay the development of a site operating plan until after issuance of the permit. Such an approach is clearly not allowed in the municipal solid waste program.

TCEQ should suspend consideration of the permit application until Hidden View Dairy has submitted its current Pollution Prevention Plan, CNMP, and RCS management plan, as well as a nutrient management plan for each third-party application field where waste from the facility will be applied. The process should then be delayed until the public has been provided with a full opportunity to review these documents and provide comments to the agency regarding whether they sufficiently meet all applicable requirements.

## V. ABSENCE OF LIMITATIONS ADDRESSING PATHOGEN POLLUTION

The permit does not include adequate requirements to control pathogens and bacteria. Federal law requires that the permitting authority exercise its best professional judgment to establish technology-based effluent limitations on a case-by-case basis in issuing a permit in cases where no national effluent limitation has been implemented for a particular contaminant. The EPA has not yet issued a national effluent limitation for pathogens discharged from CAFOs, so this requirement applies to the processing of the permit amendment application by Hidden View Dairy. TCEQ, however, has not performed this required analysis and thus has not developed the appropriate effluent limitations to address pathogen discharges. A proper consideration of the permit in exercising this best professional judgment would involve an evaluation what Best Control Technology requirements should be included in consideration of the factors set out at 40 CFR § 125.3(d)(2). This failure to adequately protect against pathogen contamination of the receiving waters will result in harm to health and human safety if the permit amendment is issued.

## VI. TECHNICAL DEFICIENCIES

### A. Failure to Account for All Phosphorus Produced

At full operation, the facility is proposed to include 3000 cows producing 525 lb/day of Phosphorus altogether, or 438,821 lb/yr of  $P_2O_5$ .<sup>5</sup> Of this 438,821 pounds of  $P_2O_5$  produced each year, 8,661 pounds will be applied as wastewater to LMU Nos. 1,2,3,4,5 and 6.<sup>6</sup> 3,681 pounds of  $P_2O_5$  will be applied in the form of slurry to on-site land management units,<sup>7</sup> with the 184,953 pounds of  $P_2O_5$  contained in the remaining slurry being transferred to third-persons.

<sup>5</sup> Application p. 18 at Table 5.1.

<sup>6</sup> See Tables 5.3a-c, p. 21-23 of the application; & lab analysis dated 3/22/06.

<sup>7</sup> 35/lb/ac/yr  $P_2O_5$  on 15.2 acres at Field No. 3a + 39 lb/ac/yr  $P_2O_5$  on 21.1 acres at Field No. 4a + 47 lb/ac/yr  $P_2O_5$  on 49.5 acres at Field No. 7 = 3,681 lb/yr  $P_2O_5$

Considering the phosphorus produced at the facility, and all of the means included in the permit for dealing with this phosphorus, the following mass balance may be constructed:

438,821 pounds P <sub>2</sub> O <sub>5</sub> produced yearly
- 8,661 pounds P <sub>2</sub> O <sub>5</sub> applied yearly to LMUs as wastewater
- 3,681 pounds P <sub>2</sub> O <sub>5</sub> applied yearly to LMUs as slurry
- <u>184,953</u> pounds P <sub>2</sub> O <sub>5</sub> transferred to third-persons yearly as slurry.
<b>241,526 pounds P<sub>2</sub>O<sub>5</sub> Unaccounted For</b>

In this manner, the application, and the permit, simply ignores over *half* of the phosphorus that will be produced by the facility each year, and fails to include any plan *at all* for how this phosphorus will be dealt with. It is impossible to conclude that the facility will not adversely impact water quality when the Applicant has provided no evidence to either the public, or the TCEQ, regarding the measures that will prevent this unaccounted for phosphorus from impacting water quality.

## B. Inadequate Monitoring and Sampling

### 1. Lagoon Capacity

The draft permit requires that Hidden View Dairy measure the sludge volume in the existing lagoons for the first time three years after permit issuance. Of course, sludge will be produced during the intervening period, and it is no less important that the facility have adequate volume for the sludge produced during the initial three years of operation than after that time. Measurement of the sludge volume immediately upon permit issuance should be required, especially since a significant portion of that volume will likely be needed to handle the large quantity of phosphorus produced at the facility that is simply unaccounted for in the permit. At least annual measurement of sludge volume during the life of the permit should be required.

### 2. Sampling of Wastewater and Slurry

Even though the protection of the North Bosque River is heavily dependent on an adequate nutrient management plan, the entire nutrient management plan is allowed to be based on a single annual sample of the wastewater produced and a single annual sample of the slurry produced at the facility. This is not adequate sampling to provide a reliable basis for the development of a plan in which the public can have any confidence.

Not only is the use of a single sample flawed because it does not provide a statistically significant basis for evaluating the characteristics of the wastewater, but the wastewater sample is likely to underestimate the concentration of phosphorus in the wastewater, because such samples are normally taken near the surface of a wastewater holding lagoon. Yet, when wastewater is removed from the lagoons for land application, the sludge at the bottom of the lagoon is disturbed and combined with the exiting wastewater. This means that the phosphorus levels in the wastewater as applied will almost surely be higher than the phosphorus levels relied on in the single wastewater

sample used in developing the nutrient management plan. While the nutrient management plan may serve as a smokescreen to allow TCEQ and the Applicant to claim that they are protecting water quality in the North Bosque River, the reliance of that plan on statistically insignificant data that almost certainly fails to reflect contaminant levels actually applied to the fields renders that plan useless for all practical purposes in protecting the North Bosque River.

Samples of the wastewater being applied should be taken at least once during each irrigation event, and should be obtained from the irrigation pipeline apparatus at a sampling point located after the pump at the source lagoon.

#### 4. Regulation of Third-Party Fields

The meaning of the phrase "not exceed the nitrogen application rate" at paragraph VII.A.8(e)(4)(i)(C) of the permit is unclear. The term "nitrogen application rate" is not defined in the permit, nor is this term defined in TCEQ Chapter 321. To impose the appropriate limitation, and make this provision consistent with the remainder of the permit, this phrase should be replaced with "not to exceed the nitrogen crop removal rate."

The provisions applicable to the third party fields at paragraphs VII.A.8(e)(4)(D) & (E) also need to be revised to ensure that protections apply when the measured soil concentration equals the values of 50, 51, 150 and 151 ppm. As written, no requirements explicitly apply when phosphorus is present at these levels. The inclusion of language making it clear that requirements apply when a value is less than *or equal* to each of these values would resolve this problem.

The regulation of application to third-party fields as set forth at paragraphs VII.A.8(e)(4)(D) & (E) should also make it clear that the application rate is not to exceed the annual nitrogen crop removal rate where that value is more restrictive than the application rate that would be allowed in consideration of phosphorus only. These same sections should also address the relationship of the application rates to the requirements of NRCS Code 590. Language should be added to make clear that when the requirements of Code 590 are more strict than the requirements that would result from application of paragraphs VII.A.8(e)(4)(C)-(E), then the stricter limits of Code 590 apply. As written, the operator may claim that it can ignore the phosphorus index for the fields so long as the requirements of paragraphs VII.A.8(e)(4)(C)-(E) are met.

The permit also does not require that application on third-party fields be performed in accordance with a nutrient management plan developed for those fields. A nutrient management plan is necessary for the public to have any assurance that the nutrients are being applied in a protective manner. Nutrient management plans should be required for each of the third-party fields, and these plans should be available for review and approval during the permitting process for this expansion in accordance with the procedural requirements of the Clean Water Act. The same is true with regard to Nutrient Utilization Plans (NUP) at third-party fields. The protection of these fields requires that a NUP be developed in cases where the soil phosphorus level exceeds 200 ppm. For any

third-party field with existing nutrient concentrations over 200 ppm, a NUP must be developed and available for review and evaluation during the permitting process.

Above all, the Executive Director has not properly recognized that the third-party fields are land management units. A "land management unit" or "LMU" includes not only areas owned by a CAFO operator, but also any area *controlled* by the CAFO operator. 30 TAC § 321.32(25). It is clear from the application and the permit that Hidden View Dairy will exercise substantial control over the application of waste at the third-party fields. The Permit at paragraph VII.A.8(e) describes how the CAFO operator will control by contract the means of waste application and the quantity of waste application on the third party fields. Thus, these fields are properly considered "land management units," and should be subject to all regulatory requirements imposed on land management units under TCEQ Chapter 321. For this reason, TCEQ should require that the exact location and boundaries of these fields be identified in the permit application; that all waste application to these fields be in accordance with a NMP and CNMP; that all buffer requirements for LMUs be met; that no application occur during the nighttime; that facilities and equipment used at the fields be inspected weekly; and that all recordkeeping and reporting requirements of 40 CFR § 412.37 and 30 TAC § 321.46 be met.

Since phosphorus leaving third-party fields is no less harmful to the environment than phosphorus leaving on-site application fields, it makes no sense to make the conditions of nutrient application at these fields any less stringent than the conditions applicable to nutrient application on on-site fields. By establishing the precedent for the expanded use of third-party fields without applying adequate controls on the use of those fields, TCEQ is only further endangering water quality in the North Bosque River.

## VII. VIOLATION HISTORY

The Hidden View Dairy has been subject to an administrative order due to the failure of the facility to prevent the discharge of contaminants into waters in the state. It has also failed to follow applicable requirements for the construction and operation of the retention control structures on-site, and has failed to follow proper notice requirements in the course of applying for authorization, requiring the Commission to overturn the ED's approval of a previous major amendment application by the facility.<sup>8</sup> Considering the violation/compliance history of Hidden View Dairy, it is questionable whether Hidden View Dairy's current permit should be renewed, much less expanded.

## VIII. ODOR

The application also does not adequately address the increased odor that will result from the addition of 1000 cows to the facility. The likelihood of excessive sludge buildup in the on-site lagoons will contribute to odor, and the lax regulation of third-party

---

<sup>8</sup> See AN INTERIM ORDER concerning Motions to Overturn concerning the Executive Director's approval of the application by William DeJong dba Hidden View Dairy for a major amendment to TPDES Permit No. 03197; TNRCC Docket No. 2001-1121-AGR, signed November 29, 2001.

application fields also will increase the likelihood that odors will be emitted from these fields at levels that will result in a nuisance.

#### **IX. HEALTH AND HUMAN SAFETY**

Issuance of the permit amendment will result in harm to the health and safety of area residents. Downstream waters are used for drinking purposes by several persons and cities. Contamination from the facility will result in high levels of pathogens that will be harmful to the health of these persons, and harmful to the livestock of persons who use the North Bosque River as sources of drinking water for livestock.

#### **X. IMPAIRMENT OF RECREATIONAL USES OF RECEIVING WATERS**

The pollution of the North Bosque River will also impair the ability of persons to use downstream waters for recreational purposes. Impacts of the facility, including the increased algal blooms that will result from issuance of the amendment, will interfere with recreational uses of the waters.

#### **XI. DEGRADATION OF RECEIVING WATERS**

A proper anti-degradation analysis has not been performed with regard to the impact of the expanded facility on the quality of receiving waters. The quality of the receiving waters will be impaired by greater than a *de minimus* amount. It has not been established what amount of degradation would be considered *de minimis* for parameters such as dissolved oxygen, nor has the TCEQ accurately determined what impact issuance of the permit will have on levels of dissolved oxygen, and other parameters, in the receiving waters. The proposed expansion would violate the anti-degradation policy set forth in TCEQ rules and Texas Statute.

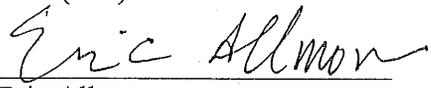
#### **XII. CONCLUSION**

For these reasons, TCEQ should deny Hidden View Dairy's application to expand its facility. The permitting process should not move forward until all information required by federal law to be provided to the public, including all plans that will govern operation of the facility, have been properly provided to both TCEQ and to the public. Due to the many deficiencies in the application, the Lone Star Chapter of the Sierra Club requests a contested case hearing regarding the application concerning each issue raised in these comments, as well as any issue raised in the comments provided to TCEQ by any other person, regardless of whether those comments are provided orally or in writing.

Respectfully Submitted,

**LOWERRE & FREDERICK**  
44 East Ave, Suite 100

Austin, TX 78701  
Tel. (512) 469-6000  
Fax (512) 482-9346



Eric Allmon  
Eric Allmon  
State Bar No. 24031819

AGR  
37581

# LOWERRE & FREDERICK

ATTORNEYS AT LAW  
44 East Avenue, Suite 100  
Austin, Texas 78701  
(512) 469-6000 • (512) 482-9346 (facsimile)  
Mail@LF-LawFirm.com

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

2007 MAY 29 PM 4:49

CHIEF CLERKS OFFICE

May 29, 2007

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

OPA H

MAY 30 2007

BY \_\_\_\_\_ *[Signature]*

Re: Application by Hidden View Dairy for  
TCEQ Water Quality Permit No. 03197  
Request for Contested Case Hearing by Clean Water Action.

Ms. Castañuela:

Clean Water Action requests a contested case hearing regarding the application of Hidden View Dairy for an expansion of Texas Commission on Environmental Quality (TCEQ) Water Quality Permit No. 03197 with respect to each issue raised by the Lone Star Chapter of the Sierra Club (the "Club") in its previously submitted public comments. CWA may be contacted through Lowerre & Frederick at the address, phone number, and fax number indicated above.

## I. Affected Person Status

Clean Water Action ("CWA") requests a contested case hearing with regard to the above-referenced application. CWA is a nationwide membership organization whose purposes include the preservation and protection of surface water quality, and the use and enjoyment of surface waters by its members. The membership of Clean Water Action includes persons who receive water service from the City of Waco, and thus receive their water from Lake Waco. Lake Waco is contaminated by runoff from dairy operations such as the Hidden View Dairy. Expansion of the facility will result in the increased contamination of Lake Waco by pathogens and nutrients, only worsening the potential for water quality issues in Waco drinking water, and worsening problems with the taste of Waco drinking water. Clean Water Action also has other members who will be impacted by the construction and operation of the facility.

## II. Violation of Water Quality Standards

The facility is proposed to be located in the drainage area of the North Bosque River in Segment 1226 of the Brazos River Basin. This segment has been recognized as out of compliance for state water quality standards regarding algal growth and bacteria. TCEQ

*MW*



has acknowledged that, “water quality concerns in the North Bosque River watershed are largely associated with animal feeding operations.”<sup>1</sup> Phosphorus has been identified as the pollutant most directly responsible for algal blooms in this river. Waste from Confined Animal Feeding Operations (CAFOs) in the watershed is also largely responsible for the bacteria problems in the river.

The expansion of the Hidden View Dairy constitutes a “new source” or “new discharger” under federal law. CWA disputes the Executive Director’s (ED) Response No. 1 in the Response to Comments (RTC). Federal law prohibits the issuance of a permit when that permit will not ensure compliance with state water quality standards. This permit does not ensure such compliance. A demonstration must be made, prior to the close of the public comment period, that sufficient remaining pollutant load allocations in the receiving waterbody exist for the discharge, and other dischargers into the waterbody are subject to a compliance schedule that will bring the waterbody into compliance with applicable water quality standards. This demonstration has not been made.

It also has not been shown that adequate requirements are included in the permit to ensure that the state water quality standard for bacteria will be met. Sources of contaminants that will contribute these violations include not only the on-site and off-site application fields, but also the retention control structures at the site.

CWA seeks a hearing not only with regard to the impact of *on-site* application fields on water quality, but also the surface water quality impact of *off-site* or *third-party* application fields authorized by the permit.

### **III. The Permit is Inconsistent with the Total Maximum Daily Load for the North Bosque River Watershed**

The proposed permit is inconsistent with the TMDL implementation plan for Phosphorus in the North Bosque. Examples of assumptions that will be undermined by the permit include the following:

<b>TMDL Assumption</b>	<b>Contrary Permit Allowance</b>
40,450 Dairy Cows in Watershed	Allows 1000 head increase with no offsetting decrease at another facility.
50% of solid manure from 40,450 dairy cows would be removed from watershed	No manure from any of the 3000 cows at the facility is required to be removed from watershed
Phosphorus in the diet of permitted cows would be limited to 0.4%	No limit on phosphorus in diet of 3000 cows
Waste application on existing fields would	Waste may be applied on four existing

<sup>1</sup> IMPLEMENTATION PLAN FOR SOLUBLE REACTIVE PHOSPHORUS IN THE NORTH BOSQUE WATERSHED FOR SEGMENTS 1226 AND 1255. TCEQ and Texas State Soil and Water Conservation Board, December 2002.

be limited so that Phosphorus never exceeds 200ppm	fields already with phosphorus concentrations over 200 ppm
Waste application rate would be limited to phosphorus needs of the crop	Phosphorus may be applied well in excess of phosphorus needs on fields with phosphorus levels under 200ppm
Initial Phosphorus on new fields would be 60 ppm, and could not exceed this level	Phosphorus may be applied to new third-party fields at well over phosphorus needs until soil phosphorus levels reach 150 ppm.

In this manner, and others discussed in the public comments, issuance of the draft permit would greatly undermine any effort by TCEQ to attain surface water quality standards in the North Bosque River. CWA disputes ED's Response No. 2 in the RTC, and CWA requests a contested case hearing with regard to whether the proposed expansion is consistent with the total maximum daily loads for Phosphorus in the North Bosque River, and the Implementation Plan for Soluble Reactive Phosphorus in the North Bosque River Watershed.

#### IV. UNAVAILABILITY OF DOCUMENTS

CWA requests that TCEQ suspend consideration of the permit application until Hidden View Dairy has submitted its current Pollution Prevention Plan, CNMP, and RCS management plan, as well as a nutrient management plan for each third-party application field where waste from the facility will be applied. The process should then be delayed until the public has been provided with a full opportunity to review these documents and provide comments to the agency regarding whether they sufficiently meet all applicable requirements. The Clean Water Act requires that these documents be provided for public review during the permitting process, and the applicant cannot meet its burden of proof without providing these documents.

The ED in the Response to Comments claims that the comprehensive nutrient management plan (CNMP) does not need to be made available to the public during the permitting process. Yet, the ED admits that this plan is a requirement of the TCEQ rules, which implement the TPDES program that is itself Texas' delegated program to implement the federal Clean Water Act. As such, the provisions of the CNMP are part of the federally-enforceable permit for the facility. The fact that the CNMP is otherwise treated as confidential by the State is irrelevant. Once the CNMP is integrated into a program implementing the Clean Water Act, and treated as embodying permit requirements, any claim to confidentiality under state law is lost. Quite simply, if the requirements of the CNMP have any enforceable meaning, then the status of these requirements as a means of implementing federal Clean Water Act trumps any state law protections that might confer confidential status to the CNMP.

#### V. ABSENCE OF LIMITATIONS ADDRESSING PATHOGEN POLLUTION

CWA disputes ED's Response Nos. 3,4 and 12 in the ED's RTC. The draft permit does not include adequate requirements to control pathogens and bacteria. Federal law requires that the permitting authority exercise its best professional judgment to establish technology-based effluent limitations on a case-by-case basis in issuing a permit in cases where no national effluent limitation has been implemented for a particular contaminant. The EPA has not yet issued a national effluent limitation for pathogens discharged from CAFOs, so this requirement applies to the processing of the permit amendment application by Hidden View Dairy. TCEQ, however, has not performed this required analysis and thus has not developed the appropriate effluent limitations to address pathogen discharges. A proper consideration of the permit in exercising this best professional judgment would involve an evaluation what Best Control Technology requirements should be included in consideration of the factors set out at 40 CFR § 125.3(d)(2). This failure to adequately protect against pathogen contamination of the receiving waters will result in harm to health and human safety if the permit amendment is issued.

#### **VI. TECHNICAL DEFICIENCIES**

CWA disputes the ED's Response Nos. 13, 14, 15, 16, 17, 19, and 20. CWA requests a contested case hearing on each of these issues.

#### **VII. VIOLATION HISTORY**

CWA disputes the ED's conclusion in Response No. 7 in the RTC. CWA requests a hearing regarding Hidden View Dairy's compliance history.

#### **VIII. HEALTH AND HUMAN SAFETY**

CWA disputes Response No. 9 in the ED's RTC. CWA believes that issuance of the permit will result in harm to the health and safety of area residents, and downstream users of water. CWA requests a hearing on these issues, without limitation to only those impacts occurring in the North Bosque River. The public comments filed by the Sierra Club were not limited to only impacts in the North Bosque River.

#### **IX. IMPAIRMENT OF RECREATIONAL USES OF RECEIVING WATERS**

CWA also disputes the ED's conclusion that the operation of the facility will not result in algal blooms that will interfere with recreational use of downstream waters. CWA seeks a hearing on this question. CWA seeks a hearing on the impacts of the facility on the recreational use of *all* downstream waters, not just the North Bosque River.

#### **X. DEGRADATION OF RECEIVING WATERS**

CWA disputes ED's Response No. 10 in the ED's RTC. CWA believes that issuance of the permit will result in the degradation of receiving waters, and CWA believes that issuance of the permit would violate the anti-degradation policy set forth in TCEQ rules and Texas Statute. CWA seeks a hearing regarding whether issuance of the permit will result in the improper degradation of receiving waters for parameters including dissolved oxygen.

### XI. Migratory Species

CWA disputes the ED's Conclusion in Response No. 22 of the ED's RTC. CWA believes that the potential remains for the construction and operation of the facility to adversely impact migratory species. A statement by the US Fish & Wildlife Service that it will offer no further comment on the issue does not constitute a withdrawal of the comments already made, so this issue still qualifies to be referred as it was raised during the public comment period and was not withdrawn prior to the issuance of the RTC.

### XII. CONCLUSION

For these reasons, CWA requests a contested case hearing on the application by Hidden View Dairy for Permit No. 3197 with regard to each issue raised in this request.

Respectfully Submitted,

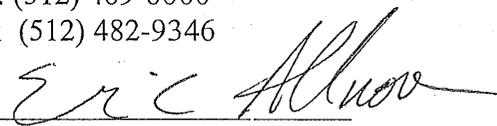
**LOWERRE & FREDERICK**

44 East Ave, Suite 100

Austin, TX 78701

Tel. (512) 469-6000

Fax (512) 482-9346



Eric Allmon

State Bar No. 24031819

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2007 MAY 29 PM 4:19  
CHIEF CLERKS OFFICE

AGR  
37581

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

# LOWERRE & FREDERICK

ATTORNEYS AT LAW

44 East Avenue, Suite 100

Austin, Texas 78701

(512) 469-6000 • (512) 482-9346 (facsimile)

Mail@LF-LawFirm.com

May 29, 2007

2007 MAY 29 PM 4:49

CHIEF CLERKS OFFICE

LaDonna Castañuela

Office of the Chief Clerk, MC 105

TCEQ

P. O. Box 13087

Austin, TX 78711-3087

OPA H

MAY 30 2007

BY



Re: Application by Hidden View Dairy for  
TCEQ Water Quality Permit No. 03197  
Request for Contested Case Hearing by Lone Star Chapter of the  
Sierra Club.

Ms. Castañuela:

The Lone Star Chapter of the Sierra Club (the "Club") requests a contested case hearing regarding the application of Hidden View Dairy for an expansion of the operations authorized by Texas Commission on Environmental Quality (TCEQ) Water Quality Permit No. 03197 with respect to each issue raised by the Club in its previously submitted public comments.

## I. Affected Person Status

The Club is an affected person with respect to the Hidden View Dairy. The Club is a membership organization whose purposes include protection of the environment in the state of Texas, and the protection of the use and enjoyment of the environment in the state of Texas by members of the Club. The membership of the Lone Star Chapter of the Sierra Club includes persons affected by the proposed facility, such as the following:

### 1. Member Adjacent to Site or Within One Mile Downstream

A member of the Club owns property that is situated adjacent to either the primary location of the facility (not including off-site application fields), or adjacent to Green Creek within one mile downstream of the primary location of the facility. The Club will not publicly disclose the identity of this person at this time, because this person has a reasonable fear of retribution if they are identified as a member. The Club is not alleging that Hidden View Dairy would commit any act of intimidation, only that this member's fear of retribution is reasonable.



Attached is a sworn affidavit of Ken Kramer, Chapter Director of the Club, attesting that the Club has a member meeting these criteria.<sup>1</sup> The Club will also provide a supplemental sworn affidavit of Stuart Henry, who has represented several different persons who have opposed applications by dairies in the Bosque watershed in the past. Mr. Henry will attest, under oath, that his clients have received threats of violence from dairies within the Bosque watershed, and he will also attest to actual instances of physical violence committed as retribution against his clients as a result of their decisions to challenge TCEQ authorizations of dairies in the Bosque watershed. The common knowledge in the community of such prior intimidation tactics demonstrates the reasonableness of the fear of the Club's member referenced in the affidavit, even if Hidden View Dairy itself has no intent of performing any act of retribution.

The Club is also willing to provide specific documentation of the person's identity, property ownership, and affected interests, to an ALJ for *in camera* review in order for the ALJ to evaluate whether that member would qualify as an affected person. Granting of the application will adversely impact the aesthetic enjoyment of this person's property, and would result in the movement of odors onto his/her property.

## 2. Member Adjacent to Authorized Location for Off-Site Application Fields

Boyd Waggoner is also a member of the Sierra Club. He is the owner of more than 1800 acres in Erath County. The proposed permit would authorize the application of waste on third-party application fields, but the location of these fields has not been specified. As authorized by the draft permit, waste from the dairy could be applied on fields located adjacent to property owned by Mr. Waggoner. Thus, his ability to use his property for domestic and livestock purposes is potentially affected by the application. Any person owning property adjacent to an off-site application field will be unquestionably impacted by the issuance of the permit. An applicant cannot deny the public knowledge of where the off-site application fields will be located, and still oppose standing for a person owning property that is adjacent to a potential site for the off-site application fields. Mr. Donald Turner, who owns property within 10 miles of the facility, is also a member of the Sierra Club, and there is also the potential for off-site application fields to be located adjacent or shortly upstream of his property.

## 3. Downstream Members

The Club also has other members who own property adjacent to waters downstream of the facility, which will be affected by construction and operation of the facility. Donald Turner is a member of the Club. He owns property that is adjacent to Green Creek for a length of 3 continuous river miles. This entire length of property is believed to be within ten (10) miles of the primary location of the facility. Green Creek flows through the facility before reaching his property. Contamination of Green Creek by the proposed permitted activities could adversely impact Mr. Turner's ability to use his land for domestic and livestock purposes, may result in the contamination of his property, and could impair his aesthetic enjoyment of this land.

---

<sup>1</sup> Attachment A

#### 4. Members Using Water Downstream as a Drinking Source

Additionally, the Club has over 75 members who reside in the City of Waco, and receive water from Lake Waco. Lake Waco is contaminated by runoff from dairy operations such as the Hidden View Dairy. This contamination results in the potential for unsafe drinking water, and adverse impacts on the taste of drinking water provided by the City of Waco from Lake Waco. Construction and operation of the facility will potentially result in the increased contamination of Lake Waco, only worsening the potential for water quality issues in Waco drinking water, and worsening problems with the taste of Waco drinking water.

## **II. Violation of Water Quality Standards**

The facility is proposed to be located in the drainage area of the North Bosque River in Segment 1226 of the Brazos River Basin. This segment has been recognized as out of compliance for state water quality standards regarding algal growth and bacteria. TCEQ has acknowledged that, "water quality concerns in the North Bosque River watershed are largely associated with animal feeding operations."<sup>2</sup> Phosphorus has been identified as the pollutant most directly responsible for algal blooms in this river. Waste from Confined Animal Feeding Operations (CAFOs) in the watershed is also largely responsible for the bacteria problems in the river.

The expansion of the Hidden View Dairy constitutes a "new source" or "new discharger" under federal law. The Club disputes the Executive Director's (ED) Response No. 1 in the Response to Comments (RTC). As discussed in the Club's public comments, federal law prohibits the issuance of a permit when that permit will not ensure compliance with state water quality standards. This permit does not ensure such compliance. A demonstration must be made, prior to the close of the public comment period, that sufficient remaining pollutant load allocations in the receiving waterbody exist for the discharge, and other dischargers into the waterbody are subject to a compliance schedule that will bring the waterbody into compliance with applicable water quality standards. This demonstration has not been made.

It also has not been shown that adequate requirements are included in the permit to ensure that the state water quality standard for bacteria will be met. This is also a violation of federal law. Sources of contaminants that will contribute these violations include not only the on-site and off-site application fields, but also the retention control structures at the site.

The Sierra Club's comments expressed concern not only with regard to the impact of *on-site* application fields, but also the surface water quality impact of *off-site* or *third-party* application fields authorized by the permit. Sierra Club reiterates its request for a

---

<sup>2</sup> IMPLEMENTATION PLAN FOR SOLUBLE REACTIVE PHOSPHORUS IN THE NORTH BOSQUE WATERSHED FOR SEGMENTS 1226 AND 1255. TCEQ and Texas State Soil and Water Conservation Board, December 2002.

hearing regarding whether the activities authorized by the permit, including the application of material to off-site or to third-party application fields, will adversely impact water quality and/or result in the violation of surface water quality standards.

**III. The Permit is Inconsistent with the Total Maximum Daily Load for the North Bosque River Watershed**

The proposed permit is inconsistent with the TMDL implementation plan for Phosphorus in the North Bosque. Examples of assumptions that will be undermined by the permit include the following:

<b>TMDL Assumption</b>	<b>Contrary Permit Allowance</b>
40,450 Dairy Cows in Watershed	Allows 1000 head increase with no offsetting decrease at another facility.
50% of solid manure from 40,450 dairy cows would be removed from watershed	No manure from any of the 3000 cows at the facility is required to be removed from watershed
Phosphorus in the diet of permitted cows would be limited to 0.4%	No limit on phosphorus in diet of 3000 cows
Waste application on existing fields would be limited so that Phosphorus never exceeds 200ppm	Waste may be applied on four existing fields already with phosphorus concentrations over 200 ppm
Waste application rate would be limited to phosphorus needs of the crop	Phosphorus may be applied well in excess of phosphorus needs on fields with phosphorus levels under 200ppm
Initial Phosphorus on new fields would be 60 ppm, and could not exceed this level	Phosphorus may be applied to new third-party fields at well over phosphorus needs until soil phosphorus levels reach 150 ppm.

In this manner, and others discussed in the public comments, issuance of the draft permit would greatly undermine any effort by TCEQ to attain surface water quality standards in the North Bosque River. The Club disputes ED's Response No. 2 in the RTC, and the Club requests a contested case hearing with regard to whether the proposed expansion is consistent with the total maximum daily loads for Phosphorus in the North Bosque River, and the Implementation Plan for Soluble Reactive Phosphorus in the North Bosque River Watershed.

**IV. UNAVAILABILITY OF DOCUMENTS**

The Club renews its request that TCEQ suspend consideration of the permit application until Hidden View Dairy has submitted its current Pollution Prevention Plan, CNMP, and RCS management plan, as well as a nutrient management plan for each third-party application field where waste from the facility will be applied. The process should

then be delayed until the public has been provided with a full opportunity to review these documents and provide comments to the agency regarding whether they sufficiently meet all applicable requirements. The Clean Water Act requires that these documents be provided for public review during the permitting process, and the applicant cannot meet its burden of proof without providing these documents.

The ED in the Response to Comments claims that the comprehensive nutrient management plan (CNMP) does not need to be made available to the public during the permitting process. Yet, the ED admits that this plan is a requirement of the TCEQ rules, which implement the TPDES program that is itself Texas' delegated program to implement the federal Clean Water Act. As such, the provisions of the CNMP are part of the federally-enforceable permit for the facility. The fact that the CNMP is otherwise treated as confidential by the State is irrelevant. Once the CNMP is integrated into a program implementing the Clean Water Act, and treated as embodying permit requirements, any claim to confidentiality under state law is lost. Quite simply, if the requirements of the CNMP have any enforceable meaning, than the status of these requirements as a means of implementing federal Clean Water Act trumps any state law protections that might confer confidential status to the CNMP.

#### **V. ABSENCE OF LIMITATIONS ADDRESSING PATHOGEN POLLUTION**

The Club disputes ED's Response Nos. 3,4 and 12 in the ED's RTC. The permit does not include adequate requirements to control pathogens and bacteria. Federal law requires that the permitting authority exercise its best professional judgment to establish technology-based effluent limitations on a case-by-case basis in issuing a permit in cases where no national effluent limitation has been implemented for a particular contaminant. The EPA has not yet issued a national effluent limitation for pathogens discharged from CAFOs, so this requirement applies to the processing of the permit amendment application by Hidden View Dairy. TCEQ, however, has not performed this required analysis and thus has not developed the appropriate effluent limitations to address pathogen discharges. A proper consideration of the permit in exercising this best professional judgment would involve an evaluation what Best Control Technology requirements should be included in consideration of the factors set out at 40 CFR § 125.3(d)(2). This failure to adequately protect against pathogen contamination of the receiving waters will result in harm to health and human safety if the permit amendment is issued.

#### **VI. TECHNICAL DEFICIENCIES**

The ED has not corrected the technical deficiencies raised in the Club's comments. The continued existence of these deficiencies will result in harm to water quality. The Club disputes the ED's Response Nos. 13, 14, 15, 16, 17, 19, and 20. The Club requests a contested case hearing on each of these issues.

#### **VII. VIOLATION HISTORY**

The Club disputes the ED's conclusion in Response No. 7 in the RTC. The Club requests a hearing regarding Hidden View Dairy's compliance history.

### **VIII. ODOR**

The Club disputes the ED's conclusion in Response No. 8 in the RTC. Insofar as the ED classifies the public comments of the Club as only raising nuisance odor issues, the ED has mischaracterized the issue raised by the Club. Comments filed by the Club questioned whether the application meets all applicable odor control requirements, not just the prohibition on nuisance odors. Thus, the Club continues to request a hearing on whether the application meets all applicable odor control requirements, including the prevention of nuisance odor conditions.

### **IX. HEALTH AND HUMAN SAFETY**

The Club disputes Response No. 9 in the ED's RTC. The Club maintains that issuance of the permit will result in harm to the health and safety of area residents, and downstream users of water. Insofar as the ED has characterized the Club's comments as only raising issues of users of water in the North Bosque River, the ED has mischaracterized the issue raised. The public comments filed by the Club raised the issue of impacts on *all* downstream users of water for livestock or drinking water purposes. It would be improper to limit the issue raised to only impacts within the North Bosque River. The Club requests a hearing on these issues, without limitation to only those impacts occurring in the North Bosque River.

### **X. IMPAIRMENT OF RECREATIONAL USES OF RECEIVING WATERS**

The Club also disputes the ED's conclusion that the operation of the facility will not result in algal blooms that will interfere with recreational use of downstream waters. The Club continues to seek a hearing on this question. Insofar as the ED has characterized the Club's comments as only regarding the North Bosque River, the ED has mischaracterized the issue raised by the Club. The Club sought, and continues to seek, a hearing on the impacts of the facility on the recreational use of *all* downstream waters, not just the North Bosque River.

### **XI. DEGRADATION OF RECEIVING WATERS**

The Club disputes ED's Response No. 10 in the ED's RTC. The Club maintains that issuance of the permit will result in the degradation of receiving waters, and the club continues to seek a hearing on whether issuance of the permit would violate the anti-degradation policy set forth in TCEQ rules and Texas Statute. The Club also continues to seek a hearing regarding whether issuance of the permit will result in the improper degradation of receiving waters for parameters including dissolved oxygen.

## **XII. Migratory Species**

The Club disputes the ED's Conclusion in Response No. 22 of the ED's RTC. The Club believes that the potential remains for the construction and operation of the facility to adversely impact migratory species. A statement by the US Fish & Wildlife Service that it will offer no further comment on the issue does not constitute a withdrawal of the comments already made, so this issue still qualifies to be referred as it was raised during the public comment period and was not withdrawn prior to the issuance of the RTC.

**XIII. CONCLUSION**

For these reasons, the Lone Star Chapter of the Sierra Club requests a contested case hearing on the application by Hidden View Dairy for Permit No. 3197 with regard to each issue raised in the Club's public comments previously filed on the application. Insofar as the ED in his RTC has mischaracterized issues raised by the Club during the public comment period, the Club continues to request referral of those issues as raised by the Club, and not as limited by the ED.

Respectfully Submitted,

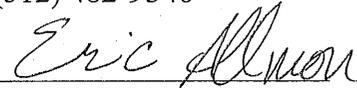
**LOWERRE & FREDERICK**

44 East Ave, Suite 100

Austin, TX 78701

Tel. (512) 469-6000

Fax (512) 482-9346



Eric Allmon

State Bar No. 24031819

CHIEF CLERKS OFFICE

2007 MAY 29 PM 4:49

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

# Attachment A

TCEQ DOCKET NO. \_\_\_\_\_

IN THE MATTER OF THE	§	
APPLICATION OF HIDDEN VIEW	§	BEFORE THE TEXAS
DAIRY FOR A MAJOR AMENDMENT	§	COMMISSION ON
TO TPDES PERMIT NO. 3197	§	ENVIRONMENTAL QUALITY

AFFIDAVIT OF KEN KRAMER

Before me, the undersigned notary, on this day, personally appeared Ken Kramer, a person whose identity is known to me. After I administered an oath to him, upon his oath, he said:

1. My name is Ken Kramer. I am over eighteen (18) years of age and of sound mind, have never been convicted of a felony, and am otherwise capable of making this affidavit.
2. I am the Chapter Director of the Lone Star Chapter of the Sierra Club.
3. The Lone Star Chapter of the Sierra Club includes a person who owns property adjacent to either the facility, or adjacent to Green Creek and less than one mile downstream of the facility.
4. By my signature below, I swear that this Affidavit is made on personal knowledge, and the statements made, above, are true and correct.

Ken Kramer  
 Ken Kramer

SUBSCRIBED AND SWORN TO before me this 29 day of May, 2007.

Hanna Day Woodruff  
 Notary Public, State of Texas

My commission expires:

Jan 27, 2010

