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Larry R. Soward, *Commissioner*
H. S. Buddy Garcia, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 30, 2007

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

CHIEF CLERKS OFFICE
2007 JUL 30 PM 3:36
TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Re: **HIDDEN VIEW DAIRY**
TCEQ DOCKET NO. 2007-0831-AGR

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Requests for Contested Case Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2007-0831-AGR

2007 JUL 30 PM 3:36

APPLICATION BY
HIDDEN VIEW DAIRY
TO AMEND TPDES PERMIT
NO. WQ0003197000

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BEFORE THE CHIEF CLERKS OFFICE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
REQUESTS FOR CONTESTED CASE HEARING**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (TCEQ or "Commission") files this response to the requests for a contested case hearing.

Introduction

Hidden View Dairy ("Dairy" or "Applicant") has applied to the TCEQ for a major amendment of Texas Pollutant Discharge Elimination System (TPDES) permit no. WQ0003197000. This permit authorizes a concentrated animal feeding operation (CAFO), and the Applicant is seeking to expand the Dairy from 2,000 head to a maximum of 3,000 head, of which 2,500 would be milking cows. The Dairy is located on the northwest side of County Road 522, approximately one-quarter mile northeast of the intersection of County Road 522 and State Highway 6 in Erath County. The Dairy's location falls within the North Bosque River drainage area, in Segment No. 1226 of the Brazos River Basin.

The agency received this amendment application on January 27, 2004, and the application was declared administratively complete on March 15, 2004. The first notice was published April 7, 2004 in the *Stephenville Empire Tribune*. On December 19, 2006, the second notice was published in the same newspaper. The public comment period closed January 18,

2007. The Executive Director's (ED) Response to Comments (RTC) was filed April 20, 2007, and the hearing request period closed May 29, 2007.

The agency received two hearing requests from the Lone Star Chapter of the Sierra Club ("Sierra Club"), and one hearing request from Clean Water Action (CWA). The agency also received a comment letter from the U.S. Fish and Wildlife Service.

Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under 30 Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

Under 30 TAC § 55.203(a), 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Subsection (b) states that governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons. Subsection (c) provides relevant factors to be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restriction or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

As provided by 30 TAC § 55.205(a), 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 seeks 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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

Analysis

I. Affected Person

A. Clean Water Action

CWA's hearing request states that it 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. CWA also states that its membership includes persons who receive water service from the City of Waco and thus receive their water from Lake Waco. Regarding affected person status, CWA concludes by stating that it has members who will be impacted by the construction and operation of the facility.

Under 30 TAC § 55.205(a), a group or association seeking affected person status must show that one or more members of the group or association would otherwise have standing to request a hearing in their own right. CWA has not specified at least one member of the group who would individually qualify as an affected person. OPIC therefore finds that CWA has failed to demonstrate how it qualifies as an affected person.

B. Sierra Club

Sierra Club states that it is a membership organization whose purposes include protection of the environment in Texas and protection of the use and enjoyment of the environment in Texas by members of the Club.

Unnamed Member

The hearing request states that a member of the Sierra Club owns property that is situated adjacent to either the primary location of the facility or adjacent to Green Creek within one mile downstream of the primary location of the facility. Sierra Club states that at this time it will not publicly disclose the identity of its member because the member has a reasonable fear of retribution if his or her identity is disclosed. However, attached to Sierra Club's hearing request is an affidavit from Ken Kramer, Chapter Director of the Lone Star Chapter, and Mr. Kramer states that the member's location is as described in the hearing request. Sierra Club additionally states that granting this application will adversely impact the aesthetic enjoyment of the member's property and would result in the movement of odors onto the member's property.

While OPIC appreciates Sierra Club's concern about the protection of its members, OPIC cannot fully evaluate Sierra Club's hearing request without further information. This unnamed person is one of the members that Sierra Club is relying on to satisfy the § 55.205(a) criteria for group standing. It is not possible to determine if this member is an affected person without more specific information about his or her location and interests. Furthermore, while OPIC appreciates the concerns about retribution, OPIC finds that the Applicant's due process rights will eventually require the disclosure of this member's identity so that the issue of standing can be fully explored. In light of this, OPIC would like to request that Sierra Club provide further

explanation concerning this unnamed member, as allowed by § 55.205(b). At this time, OPIC cannot find that this unnamed member provides affected person status for Sierra Club.

Boyd Waggoner

Sierra Club states that member Boyd Waggoner owns property adjacent to fields where waste from the dairy could potentially be applied, and his ability to use his property for domestic and livestock purposes is potentially affected by the application. Sierra Club is not asserting that Mr. Waggoner owns property adjacent to fields where dairy waste will definitely be applied. Rather, the concern appears to be the possibility that fields adjacent to Mr. Waggoner's property could be used as third party application sites. Given the uncertainty that this scenario will occur, OPIC cannot support affected person status for Sierra Club based on Mr. Waggoner's membership.

Donald Turner

Sierra Club states that member Donald Turner owns property within 10 miles of the facility; his property is adjacent to Green Creek for 3 continuous river miles; and Green Creek flows through the facility before reaching his property. Sierra Club asserts that contamination of Green Creek by the Dairy 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. Given the intervening distance between Mr. Turner and the Dairy, OPIC finds it unlikely that Mr. Turner's health, safety, or use of property will be negatively impacted by the Dairy or that Mr. Turner's use of water resources will be negatively impacted. OPIC therefore cannot support affected person status for Sierra Club based on Mr. Turner's membership.

Members Residing in Waco

Sierra Club states that it has over 75 members who reside in the City of Waco and receive water from Lake Waco. The Club also states that construction and operation of this facility will potentially result in the increased contamination of Lake Waco, worsening the potential for water quality issues in Waco drinking water, and worsening problems with the taste of Waco drinking water. Sierra Club has not specified which of its members in Waco would be affected in a way not common to members of the general public. Without this required specificity, OPIC cannot support affected person status for Sierra Club based on unnamed members residing in Waco.

II. Relevant and Material Issues

Sierra Club disputes the following issues, which were raised during the public comment period and have not been withdrawn.

- (1) The activities authorized by the proposed permit, including the application of material to off-site or to third party application fields, will result in the violation of surface water quality standards. This issue concerns the responsibility of the TCEQ for water quality under Texas Water Code (TWC) Chapter 26 and is therefore relevant and material to the Commission's decision on the application.
- (2) The proposed permit is inconsistent with the total maximum daily load (TMDL) for the North Bosque River watershed. This issue involves matters which are regulated under TWC Chapter 26 and 30 TAC Chapter 321 and is therefore relevant and material to the Commission's decision on the application.

- (3) The required application documents were not available for public review during the permitting process. This issue raises the possibility of public notice problems and is therefore relevant and material to the Commission's decision on the application.
- (4) The proposed permit does not include adequate requirements to control pathogens and bacteria. This issue concerns federal criteria and standards for the National Pollutant Discharge Elimination System, specifically 40 CFR Parts 122 and 125, and is therefore relevant and material to the Commission's decision on the application.
- (5) The application and the proposed permit contain technical deficiencies which will result in harm to water quality. These deficiencies include a failure to account for all the phosphorous produced, inadequate monitoring and sampling, and inadequate regulation of third party application fields. This issue involves matters which are regulated under 30 TAC Chapter 321 and is therefore relevant and material to the Commission's decision on the application.
- (6) Because of the Dairy's compliance history, its current permit should not be expanded. Under TWC § 5.754, the Commission is required to consider compliance history in decisions regarding the amendment of a permit. This issue is therefore relevant and material to the Commission's decision on the application.
- (7) The application does not adequately address the increased odor that will result from the addition of 1,000 cows to the facility. The Dairy is subject to the requirements of 30 TAC Chapter 321, including § 321.43 which addresses odor

issues. This issue is therefore relevant and material to the Commission's decision on the application.

- (8) Issuance of the proposed permit will result in harm to the health and safety of area residents and downstream users of water. This issue concerns water quality and is therefore relevant and material to the Commission's decision on the application.
- (9) Issuance of the amendment will result in increased algal blooms which will interfere with recreational uses of downstream waters. This issue concerns water quality and is therefore relevant and material to the Commission's decision on the application.
- (10) A proper anti-degradation analysis has not been performed with regard to the impact of the expanded facility on the quality of receiving waters.

Antidegradation is addressed in 30 TAC § 307.5, and this issue is therefore relevant and material to the Commission's decision on the application.
- (11) The expansion and operation of the facility will adversely impact migratory and endangered bird species. According to a January 9, 2007 letter, the U.S. Fish and Wildlife Service has reached an agreement with the Dairy concerning a migratory bird monitoring program. Given this federal agency's jurisdiction over the issue and its conclusion regarding the sufficiency of the Dairy's monitoring program, OPIC cannot find that this issue would be relevant and material to further Commission proceedings.

Conclusion

Based on the information provided by Sierra Club at this time, OPIC cannot find that Sierra Club qualifies as an affected person and must recommend that Sierra Club's hearing request be denied. Also, OPIC respectfully recommends that the Commission deny CWA's hearing request.

If the Commission should find that Sierra Club or CWA qualify as affected persons, OPIC recommends that the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

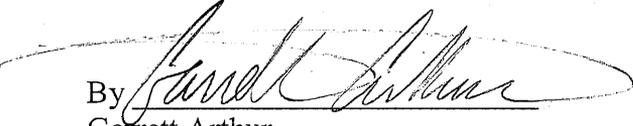
- (1) Will the activities authorized by the permit, including the application of material to off-site or to third party application fields, result in the violation of surface water quality standards?
- (2) Is the proposed permit consistent with the TMDL for the North Bosque River watershed?
- (3) Were the required application documents available for public review during the required time period?
- (4) Does the proposed permit include adequate requirements to control pathogens and bacteria?
- (5) Do the application and the proposed permit contain technical deficiencies which will result in harm to water quality?
- (6) Should the permit amendment application be denied because of Hidden View Dairy's compliance history?
- (7) Does the application adequately address the increased odor that will result from the addition of 1,000 cows to the facility?

- (8) Will issuance of the proposed permit result in harm to the health and safety of area residents and downstream users of water?
- (9) Will issuance of the amendment result in increased algal blooms which will interfere with recreational uses of downstream waters?
- (10) Has a proper anti-degradation analysis been performed with regard to the impact of the expanded facility on the quality of receiving waters?

OPIC expects a maximum duration of 6 months for the contested case hearing.

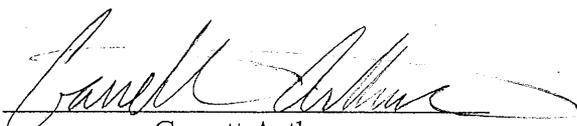
Respectfully submitted,

Blas J. Coy, Jr.
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By 
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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2007, the original and eleven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.


Garrett Arthur

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

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