

Buddy Garcia, *Chairman*  
Larry R. Soward, *Commissioner*  
Bryan W. Shaw, Ph.D., *Commissioner*  
Glenn Shankle, *Executive Director*



TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

CHIEF CLERKS OFFICE

April 28, 2008

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

Re: Klaas Talsma dba Talsma Dairy  
SOAH Docket No. 582-08-0090  
TCEQ Docket No. 2007-0543-AGR-E  
Executive Director's Exceptions

Dear Ms. Castañuela:

On behalf of the Executive Director, please find enclosed the original and eleven copy of "Executive Director's Exceptions" Please file the original and return the date-stamped copy to Patrick N. Jackson, MC 175.

Please contact me at (512) 239-6501 with any questions you may have. Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick N. Jackson", written over a horizontal line.

Patrick N. Jackson  
Attorney  
Litigation Division

cc: Thomas Jecha, Enforcement Division, TCEQ, MC 128  
Sid Slocum, Water Section Manager, TCEQ, MC R-4  
Blas Coy, Public Interest Counsel, TCEQ, MC 103



## **II. Exceptions**

The Executive Director agrees with and supports the adoption of the majority of the Administrative Law Judge's ("ALJ") findings and conclusions. The ALJ concluded that Mr. Talsma committed the alleged violation. He also finds that the proposed penalty of \$3,100 is appropriate and recommends that the Commission assess that penalty against Mr. Talsma and order him to take the corrective action proposed by the Executive Director.

## **III. Suggested Modifications**

The Executive Director suggests the following changes be made to the ALJ's Proposed Order:

1. In the first paragraph of the Order insert the word "an" between the words "assessing" and "administrative" so that it reads "assessing an administrative".
2. In the first paragraph of the Order change the word "penalties" to "penalty" so that it reads "assessing an administrative penalty against".
3. In the first paragraph of the Findings of Fact on page 1, change the word "confined" to "concentrated" so that it reads "concentrated animal feeding operation".
4. In the second paragraph of the Findings of Fact on page 2, remove the word "originally" so that it reads "the permit was issued".
5. In the eleventh paragraph of the Findings of Fact on page 3, change the word "was" to "is" so that it reads "and is operating under".

## **IV. Conclusion**

The Executive Director respectfully requests that the Commission adopt the ALJ's Proposal for Decision and enter the Proposed Order with the changes requested by the Executive Director.

Respectfully submitted,

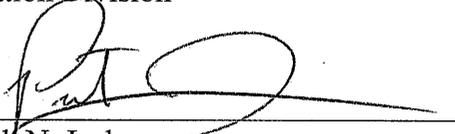
Texas Commission on Environmental Quality

Glenn Shankle  
Executive Director

Stephanie Bergeron Perdue, Deputy Director  
Office of Legal Services

Jeffrey J. Huhn, Acting Division Director  
Litigation Division

by

  
Patrick N. Jackson

State Bar of Texas No. 24055724

Litigation Division, MC 175

P.O. Box 13087

Austin, Texas 78711-3087

(512) 239-6501

(512) 239-3434 (FAX)

**CERTIFICATE OF SERVICE**

I hereby certify on this 28<sup>th</sup> day of April, 2008, the original and 11 copies of the foregoing "Executive Director's Exceptions" ("Exceptions") were filed with the Chief Clerk of the Texas Commission on Environmental Quality, Austin, Texas.

I further certify that on this day, a true and correct copy of the foregoing Exceptions were mailed via Certified Mail, Return Receipt Requested (Article No. 7003 0500 0002 9936 7441), and via First Class Mail to:

Mr. Klaas Talsma, Owner  
Talsma Dairy  
7469 County Road 209  
Hico, Texas 76457

I further certify that on this day, a true and correct copy of the foregoing Exceptions was delivered to the State Office of Administrative Hearings via hand-delivery and via Facsimile at (512) 475-4994, Attn: William G. Newchurch, Administrative Law Judge.

I further certify that on this day a true and correct copy of the foregoing Exceptions was hand-delivered to the Office of the Public Interest Counsel, Texas Commission on Environmental Quality, Austin, Texas.



Patrick N. Jackson  
Attorney  
Litigation Division  
Texas Commission on Environmental Quality

CHIEF CLERKS OFFICE

2008 APR 28 PM 3:37

TEXAS  
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER**  
**Assessing Administrative Penalties Against and Ordering Corrective Action by**  
**Klaas Talsma dba Talsma Dairy**  
**TCEQ DOCKET NO. 2007-0543-AGR-E**  
**SOAH DOCKET NO. 582-08-0090**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an order assessing an administrative penalty against and requiring corrective action by Klaas Talsma dba Talsma Dairy (Mr. Talsma). A Proposal for Decision (PFD) was presented by William G. Newchurch, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

**I. FINDINGS OF FACT**

1. Klaas Talsma owns and operates a concentrated animal feeding operation (CAFO) for dairy cattle at 7469 County Road 209, Erath County, Texas (Facility). The Facility is near Hico and in the drainage area of the North Bosque River, which is Segment No. 1226 of the Bosque River Basin.

2. Mr. Talsma holds a permit that authorizes and regulates his Facility. The permit was issued on August 9, 2002, and authorized 2,200 head of cattle at the Facility.
3. The permit states: "The permittee must comply with the applicable provisions in 30 TAC § 321.31-321.49 . . .," and "The permittee is subject . . . to pertinent changes of the rules of the TNRCC."
4. In September 2006, Mr. Talsma submitted a Comprehensive Nutrient Management Plan (CNMP) to the Texas State Soil and Water Conservation Board (TSSWCB) for review.
5. As of January 22, 2007, the TSSWCB had not certified Mr. Talsma's CNMP.
6. By letter of January 22, 2007, a member of the ED's staff asked Mr. Talsma to:

Please provide complete and accurate information requested to achieve certification to the TSSWCB no later than February 5, 2007. Failure to meet this deadline may subject your facility to enforcement action and penalties.
7. Mr. Talsma had not submitted the requested information to the TSSWCB by February 5, 2007, yet he continued to operate the Facility.
8. In July 2007, the TSSWCB certified the Facility's CNMP.
9. The Commission adopted a penalty policy in September 2002 (Penalty Policy). Under the Penalty policy:
  - a. the Talsma Facility is a minor source, which is assessed a smaller penalty than a major source;
  - b. the violation was programmatic, for which a smaller penalty is assessed than for a violation involving an actual or potential release of pollutants;
  - c. the programmatic violation was major;
  - d. there were two violation events, one each month between February 5, 2007 (when

- Mr. Talsma failed to submit the additional information that TSSWCB requested) and April 5, 2007 (when the ED screened this case for enforcement);
- e. the base penalty should be increased by 55 percent to account for Mr. Talsma's prior compliance history, which includes three notices of violation for dissimilar violations, two agreed orders without denial of liability during the last five years, and one notice of intent to conduct an audit;
  - f. Mr. Talsma was not culpable;
  - g. Mr. Talsma made no good faith effort to comply with 30 TAC § 321.42(s), in that the Facility was not fully compliant by the case-screening date;
  - h. the economic benefit of non-compliance was only \$552, which was too little to warrant an increase in the penalty; and
  - i. justice does not require a further penalty adjustment.
10. On June 29, 2007, the ED issued the EDPRP and mailed it to Mr. Talsma at his last address of record with the Commission.
  11. In the EDPRP, the ED alleged that Klaas Talsma dba Talsma Dairy had violated 30 TEX. ADMIN. CODE (TAC) § 321.42(s) by failing to develop and operate, by December 31, 2006, under a CNMP certified by the TSSWCB. The ED also asked the Commission to enter an order assessing an administrative penalty of \$3,100 against Mr. Talsma for this violation and directing him to certify that he had developed and is operating under a CNMP certified by the TSSWCB.
  12. On July 24, 2007, Mr. Talsma filed an answer to the EDPRP, which the ED treated as a request for hearing.
  13. On August 30, 2007, the ED asked the Commission's Chief Clerk to refer this case to SOAH for hearing, which she did.

14. On September 13, 2007, the Chief Clerk mailed a notice of hearing to Mr. Talsma, the ED, and the Office of Public Interest Counsel (OPIC).
15. The notice of hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted.
16. On October 11, 2007, the ALJ convened the hearing as indicated in the notice. Mr. Talsma and the ED, represented by Patrick Jackson, appeared.
17. On October 12, 2007, the ALJ issued Order No. 1, setting to case for hearing on February 19, 2008.
18. On February 19, 2008, the ALJ convened the hearing as indicated in Order No. 1, and Mr. Talsma and the ED appeared. The hearing concluded and the record was closed on that same date.

## **II. CONCLUSIONS OF LAW**

1. Under TEX. WATER CODE ANN. (Water Code) § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code or of the TEX. HEALTH & SAFETY CODE ANN. (Health & Safety Code) within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Water Code § 7.052, the penalty may not exceed \$10,000 per day of violation for the violation alleged in this case.

3. The Commission may order a violator to take corrective action concerning a violation. Water Code § 7.073.
4. As required by Water Code § 7.055 and the Commission's rule's, Mr. Talsma was notified of the EDRP and of the opportunity to request a hearing on the alleged violation, the penalty, and the corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. (Gov't Code) §§ 2001.051(1) and 2001.052, Water Code § 7.058, and the Commission's rules, Mr. Talsma was notified of the hearing on the alleged violations and the proposed penalties.
6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to Gov't Code ch. 2003.
7. Based on the above Findings of Fact, Mr. Talsma's Facility is in a "major sole-source impairment zone," which 30 TAC §321.32 (29) defines as:
  - ... A watershed that contains a reservoir:
    - (A) that is used by a municipality as a sole source of drinking water supply for a population, inside and outside of its municipal boundaries, of more than 140,000; and
    - (B) which at least half of the water flowing into is from a source that, on September 1, 2001, is on the list of impaired state waters adopted by the commission as required by 33 United States Code, §1313(d), as amended:
      - (i) at least in part because of concerns regarding pathogens and phosphorus; and
      - (ii) for which the commission, at some time, prepared and submitted a total maximum daily load standard.
8. The TCEQ inherited the powers, duties, rights, and obligations of the TNRCC on January 1, 2004. Acts 2001, 77th Leg. ch. 965 § 18.01(a)(1), eff. Jan. 1, 2004.

9. Based on the above Findings of Fact and Conclusions of Law, the Facility is subject to 30 TAC §321.42(s), which provides:

All dairy CAFOs in a major sole-source impairment zone shall develop and operate under a comprehensive nutrient management plan (CNMP) certified by the Texas State Soil and Water Conservation Board. This CNMP shall be implemented not later than December 31, 2006.

10. TCEQ rule 30 TAC 321.42(s) was proposed, adopted, and took effect in 2004, after the permit was issued for the Facility. Proposed 29 Tex. Reg. 2550, 2590 (Mar. 12, 2004); adopted 29 Tex. Reg. 6652, 6713 (Jul. 9, 2004); effective July 15, 2004.

11. Based on the above Findings of Fact, the Facility's permit did not exempt Mr. Talsma from compliance with 30 TAC § 321.42(s).

12. Based on the above Findings of Fact and Conclusions of Law, the Facility was required to implement a CNMP certified by the TSSWCB by December 31, 2006.

13. Based on the above Findings of Fact and Conclusions of Law, Mr. Talsma violated 30 TAC § 321.42(s).

14. In determining the amount of an administrative penalty, Water Code § 7.053 requires the Commission to consider several factors. To implement that requirement, the Commission has adopted the Penalty Policy.

15. Based on the above Findings of Fact and Conclusions of Law, Mr. Talsma should pay a \$3,100 penalty for violating 30 TAC § 321.42(s).

16. Based on the above Findings of Fact and Conclusions of Law, Mr. Talsma should take the corrective action described below in this Order.

### III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. Within 30 days after the effective date of this Order, Klaas Talsma shall pay an administrative penalty in the amount of \$3,100 for the violation of 30 TAC §321.42(s). The payment of this administrative penalty and taking the corrective action described below in this Order will completely resolve the violations set forth by this Order. However, the Commission shall not be constrained in any manner from requiring corrective action or assessing penalties for other violations that are not raised here. Checks rendered to pay penalties imposed by this Order shall be made out to "TCEQ." Administrative penalty payments shall be sent with the notation "Re: Klaas Talsma dba Talsma Dairy; TCEQ Docket No. 2007-0543-AGR-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

2. Within 120 days after the effective date of this Order, Mr. Talsma shall submit certification that the Facility has developed and is operating under a CNMP certified by the TSSWCB. The certification shall include detailed supporting documentation including photographs, receipts, and/or records to demonstrate compliance with this Ordering Provision. The certification shall be notarized by a State of Texas Notary Public and include the following language:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information

submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

The certification shall be submitted to:

Texas State Soil and Water Conservation Board  
Attn: Mr. Joe Ballard  
611 East Blackjack  
Dublin, Texas 76446

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Sid Slocum, Water Section Manager  
Dallas-Fort Worth Regional Office  
Texas Commission on Environmental Quality  
2301 Gravel Drive  
Fort Worth, Texas 76118-6951

3. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Mr. Talsma if the Executive Director determines that Mr. Talsma has not complied with one or more of the terms or conditions in this Commission Order.
4. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
5. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and Gov't Code § 2001.144.
6. As required by Water Code § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Mr. Talsma.

7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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Buddy Garcia, Chairman  
For the Commission