

**SOAH DOCKET NO. 582-08-0090**  
**TCEQ DOCKET NO. 2007-0543-AGR-E**

**EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**V.**

**KLAAS TALSMA DBA TALSMA  
DAIRY**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleges that Klaas Talsma dba Talsma Dairy (Mr. Talsma) violated 30 Tex. Admin. Code (TAC) § 321.42(s) by failing to develop and operate, by December 31, 2006, under a Comprehensive Nutrient Management Plan (CNMP) certified by the Texas State Soil and Water Conservation Board (TSSWCB). The ED asks 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 has developed and is operating under a CNMP certified by the TSSWCB.<sup>1</sup>

Mr. Talsma argues that he did not commit the alleged violation. He contends that he holds a permit that authorized his operation without a CNMP and required him to manage nutrients more rigorously than a CNMP would. Nevertheless, several months before he was required to have one, Mr. Talsma submitted an application to the TSSWCB for certification of a CNMP. Ultimately, the TSSWCB certified the CNMP, but only after the deadline to obtain a certification, even as extended by the ED, had passed. Mr. Talsma maintains that he should not be penalized under these circumstances, even if he technically committed the violation. He does not object to the proposed corrective action.

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<sup>1</sup> The ED originally proposed additional corrective action, including obtaining the TSSWCB's certification of the CNMP. Because the ED agrees that certification has been obtained, the ED has withdrawn that portion of his request for corrective action.

The ED does not agree that Mr. Talsma's permit allowed him to operate his dairy without a certified CNMP. He does concede that the permit required Mr. Talsma to manage nutrients. To the ED, that makes no difference. He has alleged a programmatic violation—failure to obtain and operate under a certified CNMP—not a release or potential release of pollutants.

The ED also agrees that Mr. Talsma submitted an application to the TSSWCB before the deadline and TSSWCB eventually approved it, but only after the deadline. The ED attributes that to Mr. Talsma's failure to timely respond to the TSSWCB's requests for additional information. The ED sees no basis for waiving the penalty under these circumstances.

The Administrative Law Judge (ALJ) concludes 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 ED.

## II. JURISDICTION

There is no dispute concerning either the Commission's or the ALJ's jurisdiction. The proposed order contains the necessary findings of fact and conclusion of law concerning jurisdiction.

## III. THE VIOLATION

Mr. Talsma owns and operates a confined 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.<sup>2</sup>

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<sup>2</sup> ED Ex. J, p. 2 (unmarked).

There is no dispute that 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.

Scott Johnson, a TCEQ investigator, testified, without contradiction, that the North Bosque River is upstream of Waco and meets all of those criteria; hence, it is a major sole-source impairment zone. That means the Facility would appear to be 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.

Yet Mr. Talsma contends that rule does not apply to his Facility because, unlike other owners and operators of CAFOs in the watershed, he obtained a permit that authorizes and regulates his dairy. The permit was originally issued on August 9, 2002, and authorized 2,200 head of cattle at the Facility. With certain limited exceptions, it prohibited discharges. Among other things, it required record keeping and soil sampling and compliance with specified waste, wastewater, and sludge-management practices. The permit also required all water and wastewater to be applied to land owned, operated, or controlled by Mr. Talsma and in accordance with a Nutrient Utilization Plan (NUP) approved by the ED, the phosphorus needs of the crop, or an NUP certified by the Natural Resources Conservation Service.<sup>3</sup>

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<sup>3</sup> ED Ex. J.

Nothing in the permit indicates that Mr. Talsma was exempt from compliance with the TCEQ's rules governing the Facility. To the contrary, as the ED notes, the permit states, "The permittee must comply with the applicable provisions in 30 TAC § 321.31-321.49 . . . ."<sup>4</sup> That would include 30 TAC § 321.42(s), which Mr. Talsma is accused of violating.

It is true that section 321.42(s) was proposed, adopted, and took effect in 2004, after the permit was issued for the Facility.<sup>5</sup> However, the permit states, "The permittee is subject . . . to pertinent changes of the rules of the TNRCC."<sup>6</sup> The TCEQ inherited the powers, duties, rights, and obligations of the TNRCC on January 1, 2004.<sup>7</sup>

The ALJ concludes that the Facility's permit did not exempt Mr. Talsma from compliance with 30 TAC § 321.42(s). Instead, the ALJ concludes that rule applies to Mr. Talsma's Facility. Accordingly, the Facility was required to implement a CNMP certified by the TSSWCB by December 31, 2006.

The exact date is not in evidence, but Mr. Talsma testified, without contradiction, that he submitted a CNMP application for the Facility to the TSSWCB for review in September 2006. As of January 22, 2007, it still had not been certified. By letter on that date, 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.

Mr. Johnson also testified, as documented in his March 19, 2007, Investigation Report, that Mr. Talsma had still not submitted the requested information to the TSSWCB by

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<sup>4</sup> ED Ex. J, p. 2 (as marked).

<sup>5</sup> Proposed 29 Tex. Reg. 2550, 2590 (Mar. 12, 2004); adopted 29 Tex. Reg. 6652, 6713 (Jul. 9, 2004); effective July 15, 2004.

<sup>6</sup> ED Ex. J, p. 7 (as marked).

<sup>7</sup> Acts 2001, 77th Leg. ch. 965 § 18.01(a)(1), eff. Jan. 1, 2004.

February 5, 2007, yet Mr. Talsma continued to operate the Facility.<sup>8</sup> Mr. Talsma does not deny that. Eventually, in July 2007, the TSSWCB certified the Facility's CNMP.

Even though the TSSWCB had not certified his CNMP by December 31, 2006, or even February 5, 2007, Mr. Talsma argues that he, in effect, was already implementing the CNMP. He testified that he was operating under the NUP required by the Facility's permit, which was at least as stringent as the CNMP that was finally approved. There is no evidence comparing the requirements of the NUP and CNMP in detail. However, Inspector Johnson testified that the NUP was at least as stringent as the CNMP to the extent that they regulate the same thing. In fact, the NUP is now part of the CNMP.

Despite that, the ED argues that Mr. Talsma was violating 30 TAC § 321.42(s) by continuing to operate the facility without a certified CNMP. The ALJ agrees with the ED on this point. Read as a whole, the rule required implementation by December 31, 2006, of a CNMP that had been certified by the TSSWCB. Because the TSSWCB had not yet certified the CNMP, Mr. Talsma could not have implemented the certified CNMP by the deadline, even if he was complying with the terms eventually certified.

#### **IV. THE PENALTY**

In determining the amount of an administrative penalty, TEX. WATER CODE ANN. (Water Code) § 7.053 requires the Commission to consider several factors. To implement that requirement, the Commission adopted a penalty policy in September 2002 (Penalty Policy). Applying that policy, the ED calculated that Mr. Talsma should pay a \$3,100 penalty for violating 30 TAC § 321.42(s).

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<sup>8</sup> ED Ex. G.

The proposed penalty assumes, as TCEQ Enforcement Coordinator Thomas Jecha testified, that:

- the Talsma Facility is a minor source, which is assessed a smaller penalty than a major source;
- the violation was programmatic, for which a smaller penalty is assessed than for a violation involving an actual or potential release of pollutants;
- the programmatic violation was major;
- 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);
- the base penalty should be increased by 55 percent to account for Mr. Talsma's prior compliance history, which included 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;
- Mr. Talsma was not culpable;
- 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;
- the economic benefit of non-compliance was only \$552, which was too little to warrant an increase in the penalty; and
- justice does not require a further penalty adjustment.<sup>9</sup>

Mr. Talsma does not dispute the more specific penalty factors described above. However, he argues that it would be unjust to levy any penalty on him. He notes that:

- there is no evidence of a discharge;
- his NMP required operation in a way that was at least as stringent as the CNMP that was eventually approved; and
- he timely filed his CNMP application but TSSWCB did not approve it until after the required implementation deadline, even as extended by the ED.

The ED responds that the proposed penalty is not for discharging or operating in a manner that had the potential to lead to a release. Instead, the violation was continuing to operate the Facility without obtaining TSSWCB's certification of the CNMP by the deadline. Thus, the violation was programmatic, and the penalty is lower than it would have been if there had been a discharge or a potential for discharge. The ALJ agrees with the ED on these points.

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<sup>9</sup> ED Exs. F, I, L, M, N, O, P, Q, and R.

If Mr. Talsma missed the deadline and committed the violation primarily because TSSWCB failed to timely review his CNMP application, it might be unjust to penalize him. However, the sequence of events does not show that. 30 TAC § 321.42(s) became effective on July 15, 2004; hence, Mr. Talsma had at least 17½ months before the December 31, 2006, deadline to submit an application and obtain approval of his CNMP. Because he had a permit, he erroneously believed he did not need to obtain that approval, so he did not apply until September 2006. Even then, Mr. Talsma did not provide sufficient information for TSSWCB to certify the CNMP. As late as January 22, 2007, after the CNMP-implementation deadline stated in the rule had passed, Mr. Talsma still had not supplied all of the information requested by TSSWCB. The ED gave Mr. Talsma more time, until February 5, 2007, to provide that additional requested information, but Mr. Talsma failed to provide it by then.

Under these circumstances, the ALJ cannot conclude that it would be unjust to levy the proposed penalty against Mr. Talsma. Instead, he finds that the ED properly calculated the penalty under the Penalty Policy and recommends that the Commission assess a \$3,100 penalty against Mr. Talsma.

## V. SUMMARY

The ALJ recommends that the Commission find that Mr. Talsma committed the alleged violation and should pay a \$3,100 penalty and certify that he has obtained and is operating under a CNMP certified by the TSSWCB. He also recommends that the Commission adopt the attached proposed order, which includes findings of fact and conclusions of law, to implement those findings.

**SIGNED April 10, 2008.**

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**WILLIAM G. NEWCHURCH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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 administrative penalties 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 confined 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 originally 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 was 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 EDPRP 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