

# State Office of Administrative Hearings

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY



2009 JAN -5 PM 1:12  
CHIEF CLERKS OFFICE

Cathleen Parsley  
Chief Administrative Law Judge

January 5, 2009

Les Trobman  
General Counsel  
Texas Commission on Environmental Quality  
PO Box 13087  
Austin Texas 78711-3087

**VIA FACSIMILE 512/239-5533**

**Re: SOAH Docket No. 582-08-0007; TCEQ Docket No. 2007-0831-AGR; In Re: Application by Hidden View Dairy for an Amendment to Texas Pollutant Discharge Elimination System Permit (TPDES) Permit No. WQ0003197000**

Dear Mr. Trobman:

On December 15, 2008, all parties filed Exceptions to the Proposal For Decision (PFD) issued November 24, 2008. On December 29, 2008, all parties filed their Responses. The Administrative Law Judge (ALJ) has reviewed the Exceptions and Responses and this letter is the result of that review.

Both Applicant and Executive Director (ED) seek to change Finding of Fact No. 35 regarding the proper treatment of future third-party application fields. The question of whether such fields would be new sources as argued by Protestants is an issue not before the ALJ as such fields are not required to be identified until after the permit is issued. The ALJ is of the opinion that the Finding of Fact should not be changed.

Protestants except to the purported failure of the ALJ to rule on their proposed Findings of Fact and Conclusions of Law. As noted by Applicant, the ALJ did not request proposed Findings from the parties, only allowed them to file them if desired. As a result, the ALJ is not required to rule on Protestants' proposed Findings. 30 TEX. ADMIN. CODE (TAC) § 80.252(c).

Protestants, in effect, except to Conclusion of Law No. 4 that the expansion of the dairy would not be a "new source" or "new discharge," asserting that the future application of waste on third-party fields and from equipment controlled by Applicant would constitute new sources. As noted in the PFD, because such fields are not required to be identified until after the permit is issued, the only "expansion" before the ALJ is the existing land management units (LMUs) and their ability to handle the waste from the additional cattle. At such time as Applicant seeks authorization to apply waste to third-party fields, the ED will have to determine the relationship of those fields to the expanded operation under the terms and conditions of the permit. The Conclusion of Law should not be changed.

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Protestants, in effect, except to Conclusion of Law No. 5 that the permit is consistent with the TDML, arguing that a determination of the phosphorus load as a result of the permit is required to reach such a conclusion. As noted by ED and Applicant, the expert testimony established that the permit is consistent with the TDML. The Conclusion of Law should not be changed.

Protestants, in effect, except to Conclusion of Law No. 8 that the permit complies with applicable water quality standards, asserting that the permit will authorize discharges that will violate the dissolved oxygen standards in Green Creek, that the permit contains no effluent limitations, that the nutrient management plan (NMP) is not included in the permit, that the retention control structure (RCS) management plan is not included in the permit, and that the comprehensive nutrient management plan (CNMP) is not included in the permit.

The expert testimony established that the dissolved oxygen standards in Green Creek would not be impacted by the permit. Inasmuch as a dairy is a non-point source there is no basis for imposing effluent limitations. As noted by Applicant, the NMP and CNMP were made available to Protestants during the proceedings and the RCS management plan is not required to be developed and implemented until after issuance of the permit. The Conclusion of Law should not be changed.

Protestants, in effect, except to Conclusion of Law No. 9 that a proper anti-degradation analysis was performed and that the permit would not violate anti-degradation requirements, asserting that there is no demonstration that the discharge will not result in an increase in pollution, the proper baseline water quality has not been determined, and a proper analysis for bacteria has not been performed.

The expert testimony established that because Green Creek and the North Bosque River are designated as impaired waters, only a Tier One review is required, which is the review conducted by the ED. The expert testimony also established that the permit will result in a reduction of all pollutants, including bacteria. The Conclusion of Law should not be changed.

Protestants, in effect, except to Conclusion of Law No. 10 that the permit includes adequate requirements to control pathogens, asserting that a finding must be made that the facility will employ the best conventional control technology for control of pathogens. As noted by ED, the evidence established that the permit does include adequate requirements to control pathogens. The Conclusion of Law should not be changed.

The parties noted errors in some of the findings, which errors should be corrected as follows: The ALJs agree that the following errors should be corrected and/or modifications made:

Finding of Fact No. 54- The Draft Permit materially decreases the potential for discharge of all pollutants that could be generated by the Dairy, including bacteria and oxygen-demanding

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substances, which will result in improvements of the existing water quality of the downstream waters.

Finding of Fact No. 64- The estimated total phosphorus yield will increase from 377 to 525 pounds per day (lb./day) by the addition of 1,000 head of cattle.

Finding of Fact No. 65- Utilizing a slurry analysis of the manure from the freestall barns and the measured manure volume of 18 gallons per cow per day for the existing 2,000 cows, the yield would be 330 pounds of plant-available phosphorus per day, which is less than the estimated total phosphorus yield.

New Findings of Fact Nos. 70-73:

#### TRANSCRIPTION COSTS

70. Reporting and transcription of the pre-hearing as well as the hearing on the merits was warranted as the pre-hearing examined provided Protestants the opportunity to present testimony to support their request for party status and the hearing on the merits lasted two days.
71. All parties fully participated in the pre-hearing and hearing on the merits by presentation of witnesses and cross examination.
72. All parties benefitted from preparation of the transcripts.
73. There was no evidence that any party subject to allocation of costs had the financial inability to pay a share of the costs.

New Conclusion of Law No. 12:

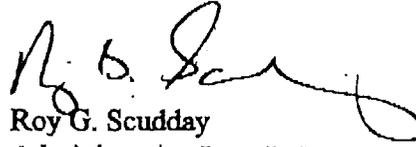
Conclusion of Law No. 12. Allocating 75 percent of reporting and transcription costs for the pre-hearing and hearing on the merits to Dairy and 25 percent of the costs to Protestants allocated equally between them, is a reasonable allocation of costs under the factors set forth in 30 TAC § 80.23(d).

Conclusions of Law Nos. 12-14 should be renumbered as 13-15.

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In summary, it is the recommendation of the undersigned ALJ that the Commission deny all exceptions and adopt the Proposal for Decision and the Proposed Order as submitted to the Commission, with the amendments set forth above.

Sincerely,



Roy G. Scudday  
Administrative Law Judge

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**STYLE/CASE:** HIDDEN VIEW DAIRY, A TEXAS GENERAL PARTNERSHIP  
**SOAH DOCKET NUMBER:** 582-08-0007  
**REFERRING AGENCY CASE:** 2007-0831-AGR

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HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ ROY SCUDDAY**

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NUMBER OF PAGES INCLUDING THIS COVER SHEET:

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EXCEPTIONS LETTER (BY ALJ)

DOCKET NUMBER:

582-08-0007

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