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December 15, 2008

**VIA HAND DELIVERY**

Ms. LaDonna Castañuela (MC-105)  
Chief Clerk  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Building F  
Austin, Texas 78753

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 DEC 15 PM 3:34  
CHIEF CLERKS OFFICE

RE: **TCEQ Docket No. 2007-0831-AGR**; SOAH Docket No. 582-008-0007;  
Application by Hidden View Dairy, a Texas general Partnership d/b/a Hidden  
View Dairy, Erath County, Texas for TPDES Permit No. WQ0003197000

Dear Ms. Castañuela:

Pursuant to 30 TAC §1.10, as amended, enclosed please find an original and eight copies of Applicant's Exceptions to and Brief in Support of the Proposal for Decision to be filed in the above-referenced proceeding. Please file mark the remaining copy and return it to me via our courier delivering same.

Please let me know if you have any questions. Thank you for your attention to this matter.

Sincerely,

  
Leonard H. Dougal

LHD:pjs  
Enclosures

cc: Hon. Roy Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15th Street, Suite 502  
Austin, Texas 78701

***Via Hand Delivery***

Docket Clerk  
State Office of Administrative Hearings  
300 West 15th Street, Suite 502  
Austin, Texas 78701

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*Via Hand Delivery*

TCEQ DOCKET NO. 2007-0831-AGR  
SOAH DOCKET NO. 582-08-0007

2008 DEC 15 PM 3: 34

APPLICATION BY HIDDEN  
VIEW DAIRY, A TEXAS GENERAL  
PARTNERSHIP, D/B/A HIDDEN VIEW  
DAIRY ERATH COUNTY, TEXAS  
FOR TPDES PERMIT NO.  
WQ0003197000

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BEFORE THE CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**APPLICANT'S EXCEPTIONS TO AND BRIEF IN SUPPORT OF THE PROPOSAL  
FOR DECISION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

Applicant Hidden View Dairy ("Applicant" or "Dairy") files this its Exceptions to and  
Brief in Support of the Administrative Law Judge's Proposal for Decision ("PFD") rendered on  
November 24, 2008, and respectfully states as follows:

**I.  
INTRODUCTION**

After considering all of the evidence and law presented in this case, Administrative Law  
Judge Roy Scudday correctly recommends in his PFD that the Applicant's individual TPDES  
water quality permit should be granted. Applicant strongly supports the ALJ's analysis,  
recitation of the facts and recommendations in the PFD as well as the proposed Findings of Fact  
and Conclusions of Law. Applicant proposes, however, a few minor clarifications, changes and  
additions to the proposed Findings of Fact and Conclusions of Law and respectfully requests that  
the Commission grant Applicant's exceptions, adopt the PFD and Findings of Fact and  
Conclusions of Law as amended by Applicant's exceptions and grant Applicant's permit.

**II.**  
**EXCEPTIONS TO PFD AND BRIEF IN SUPPORT**

**A. Third Party Fields**

In Finding of Fact No. 35, the ALJ addresses third party fields. Protestants have attempted to improperly interject the issue of the prospective use of third party application fields into the referred issue concerning whether the Dairy's expansion is a new source or new discharger in an effort to transform this proceeding into a hearing on the rulemaking of the Chapter 321, Subchapter B CAFO rules ("2004 CAFO Rules"). Specifically, Protestants seek to blur the distinction between a land management unit ("LMU") and off-site third party application fields and ultimately re-define what is considered a LMU. The 2004 CAFO Rules, however, already define LMU as "an area of land owned, operated, controlled, rented, or leased by an animal feeding operation (AFO) owner or operator to which manure, litter, or wastewater from the AFO is or may be applied."<sup>1</sup> The 2004 CAFO Rules further *expressly exclude* from the definition of LMU "lands not owned, operated, controlled, rented, or leased by the AFO operator for the purpose of off-site land application of manure, wherein the manure is given or sold to others for land application."<sup>2</sup> The Commission should specifically reject Protestants' efforts to blur the distinction between a LMU and third party field because the evidence in this hearing demonstrated that Applicant's Draft Permit complies with the 2004 CAFO Rules concerning off-site land application areas.

Specifically, all land application areas that Applicant owns, operates, leases or controls are already included within the Draft Permit as LMUs.<sup>3</sup> Further, the Draft Permit meets or exceeds the requirements of the 2004 CAFO Rules for land application to third party fields and

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<sup>1</sup> 30 TEX. ADMIN. CODE § 321.32(25).

<sup>2</sup> *Id.*

<sup>3</sup> See Applicant's Exhibit No. 14, p. 1.

Applicant has indicated his intent to comply with the terms of the Draft Permit.<sup>4</sup> Consequently, the Protestants' efforts to confuse the distinction between LMUs and third party fields should be expressly addressed by a specific finding of fact. Therefore, Applicant respectfully requests that Finding of Fact No. 35 be deleted in its entirety and replaced with a new finding of fact as follows:

35. *The application of manure to a third party field, as proposed in the Application and pursuant to the requirements of the Draft Permit and TCEQ rules, does not make the field a LMU.*

**B. Water Quality Standards and The Anti-Degradation Analysis**

The ALJ provides in Finding of Fact No. 54 that the Draft Permit decreases the allowable amounts of all pollutants that could be *generated* by the Dairy. More correctly, however, rather than placing specific limits on the amount of pollutants or nutrients that are *generated* by the Dairy, the Draft Permit instead sets forth the best management practices for managing nutrients

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<sup>4</sup> Applicant's Exhibit No. 10, pp. 15:23-31, 16: 10-18; Applicant's Exhibit No. 14, pp. 16-18. For any off site third party application field to which Applicant may apply manure or wastewater, the 2004 CAFO Rules require:

- 1) that the field must be identified in the Pollution Prevention Plan ("PPP");
- 2) that there must be a written contract between Applicant and the recipient of the manure that requires all transferred manure to be beneficially applied to third party fields identified in the PPP in accordance with the requirements of the applicable 2004 CAFO Rules and at an agronomic rate based on soil test phosphorus;
- 3) that the Applicant is prohibited from delivering manure to an operator of a third party field once the soil test phosphorus analysis shows a level equal to or greater than 200 ppm or after becoming aware that the third party field operator is not complying with the applicable 2004 CAFO Rules;
- 4) that third party fields identified in the Applicant's PPP on which manure has been applied during the preceding year must be sampled annually by a nutrient management specialist and the samples analyze; and
- 5) that the Applicant must submit records to the appropriate regional office quarterly that contain the name, locations, and amounts of manure transferred to operators of third party fields.

30 TEX. ADMIN. CODE § 321.42(j); Applicant's Exhibit No. 14, pp. 16-18.

or pollutants and decreases the potential for a release or discharge of nutrients or pollutants that are generated by the Dairy.<sup>5</sup> Accordingly, Applicant proposes that Finding of Fact No. 54 be revised to reflect this distinction as follows:

54. *The Draft Permit materially decreases the allowable amounts-potential for discharge of all pollutants that could be generated by the Dairy, including bacteria and oxygen-demanding substances, which will result in improvements of the existing water quality of the downstream waters.*

### C. Phosphorus Production

Applicant requests that Findings of Fact 64 and 65 be clarified concerning the concept of nutrient yield versus loadings. In discussing the amount of phosphorus produced by the Dairy, Applicant believes that the word “yield” would more accurately reflect the concept of phosphorus production rather than the word “loadings.”<sup>6</sup> Therefore, Applicant requests that Findings of Fact No. 64 and 65 be revised as follows:

64. *The estimated total phosphorus ~~loadings~~yield will increase from 377 to 525 pounds per day (lb./day) by the additional of 1,000 head of cattle.*

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 ~~loading~~yield.*

Applicant further believes it is important to note the manner in which the phosphorus produced will be managed by the Dairy through its Nutrient Management Plan (“NMP”) and that excess phosphorus will be exported off site in accordance with the requirements of the Draft

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<sup>5</sup> Hearing Transcript, pp. 210:19 – 211:2 (explaining that it is not the amount of manure generated by the Dairy that counts but how that manure is managed, beneficially re-used or hauled out from the Dairy that matters).

<sup>6</sup> See Hearing Transcript, p. 201 (explaining that the word “loadings” is typically used to refer to a specific amount of a nutrient or pollutant measured within a waterway over time).

Permit and TCEQ rules. In that regard, Applicant proposes the following additional finding of fact (to follow Finding of Fact No. 67):

*To the extent excess manure is produced by the Dairy that cannot be land-applied on the Dairy's LMUs in accordance with the NMP, the Draft Permit and NMP require that the excess manure be exported off site to a location specified by the Draft Permit and TCEQ rules.*

**D. Proposed Additional Ordering Provision**

In his PFD, the ALJ recommended the allocation of transcript costs between Applicant and Protestants, with seventy-five percent of the costs allocated to Applicant and twenty-five percent allocated to Protestants in equal shares between Sierra Club and Pritchey Smith.<sup>7</sup> To implement the ALJ's recommendation, Applicant respectfully requests that the Commissioners include an additional ordering provision reflecting the recommendation, as follows:

*Based upon the factors set forth in 30 TEX. ADMIN. CODE § 80.23(d), transcript costs in this proceeding are assessed in the amount of \$3,041.00, with seventy-five (75) percent of the costs allocated to Applicant and twenty-five (25) percent of costs allocated to and divided equally between Protestants to be paid to Jackson Walker, L.L.P. in accordance with the requirements and timeframe set forth by the rules.*

**III.  
CONCLUSION**

The evidence in this proceeding overwhelmingly supports issuance of the Draft Permit, and the ALJ's Proposal for Decision properly recommends that Applicant's permit be granted. Protestants have had their day in court and have failed to present any compelling evidence that warrants a denial of the Draft Permit. The Draft Permit is consistent with applicable law, is protective of water quality and should be issued. Accordingly, Applicant respectfully requests

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<sup>7</sup> PFD, pp. 27-28. Applicant has previously paid the transcript costs to the court reporter in this proceeding, and therefore, Protestants may remit their portion of the transcript costs directly to Applicant through its attorneys of record. A true and correct copy of the invoices for the transcripts of the Preliminary Hearing and the Hearing on the Merits are attached hereto as Exhibits "A" and "B", respectively.

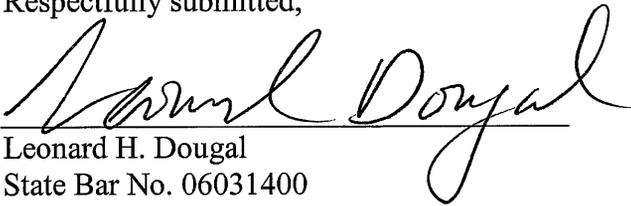
that the Commissioners of the TCEQ grant Applicant's exceptions, adopt the ALJ's Proposal for Decision and Findings of Fact and Conclusions of Law as amended by Applicant's exceptions and grant Applicant's permit.

**IV.**  
**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Applicant Hidden View Dairy respectfully prays that the Commissioners of the TCEQ:

1. Grant Applicant's permit as recommended in the Administrative Law Judge's Proposal for Decision;
2. Delete Finding of Fact No. 35 in its entirety and replace it with a new finding of fact concerning third party application fields as specified herein;
3. Revise Findings of Fact No. 54, 64 and 65 as indicated herein;
4. Add an additional finding of fact after Finding of Fact No. 67 as specified herein;
5. Add an additional ordering provision assessing transcript costs and allocating the costs between the parties as recommended by the Administrative Law Judge in the Proposal for Decision; and
6. Award such other and further relief to which Applicant may be justly entitled.

Respectfully submitted,



Leonard H. Dougal  
State Bar No. 06031400  
Courtney E. Cox  
State Bar No. 24045711

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James D. Bradbury  
State Bar No. 02814500

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Fort Worth, Texas 76102-3110  
Telephone: 817.339.1105  
Facsimile: 817.886.3495

**ATTORNEYS FOR HIDDEN VIEW DAIRY**

**CERTIFICATE OF SERVICE**

This is to certify that on this 15th day of December, 2008, a true and correct copy of the foregoing document was served on the following parties as indicated below:

Hon. Roy Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15th Street, Suite 502  
Austin, Texas 78701

*Via Hand Delivery*

Eric Allmon  
Lowerre, Frederick, Perales, Allmon & Rockwell  
707 Rio Grande, Suite 200  
Austin, Texas 78701

*Via Hand Delivery*

Robert Brush (MC-173)  
Staff Attorney  
Environmental Law Division  
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*Via Hand Delivery*

Garrett Arthur (MC-103)  
Public Interest Counsel  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Building F  
Austin, Texas 78753

*Via Hand Delivery*

Ms. LaDonna Castañuela (MC-105)  
Chief Clerk  
Texas Commission on Environmental Quality  
12100 Park 35 Circle, Building F  
Austin, Texas 78753

*Via Hand Delivery*

  
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Leonard H. Dougal

CHIEF CLERKS OFFICE

2008 DEC 15 PM 3:34

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

Kennedy Reporting Service, Inc.

1801 Lavaca, Suite 115  
Austin, TX 78701

(512) 474-2233



# Invoice

DATE

INVOICE NO.

11/20/2007 711052

BILL TO

Jackson Walker, LLP  
Attn: Accounts Payable  
100 Congress, Suite 1100  
Austin, TX 78701-4099

Thank you for your business.

JOB NUMBER	SERVICE ORDERED BY	DOCKET NUMBER	CASE NAME
7374	Donna Pirkle	582-08-0007	App. by Hidden View Dairy

DATE TAKEN	DESCRIPTION	QUANTITY	RATE	AMOUNT
11/8/2007	State Office of Administrative Hearings			
	Texas Commission on Environmental Quality			
	Prehearing Conference			
	Original & Two Copies - Expedited One Week Delivery	135	7.30	985.50
	E-transcript	1	25.00	25.00
	Administrative Expense Fee	1	25.00	25.00
	Tax ID # 74-1837735			
TERMS:	Due on receipt	<b>Total</b>		\$1,035.50

EXHIBIT   A

**KENNEDY REPORTING SERVICE, INC.**  
 1801 LAVACA, SUITE 115  
 AUSTIN, TX 78701  
 (512) 474-2233



# Invoice

DATE      INVOICE NO.  
 9/8/2008      809027

BILL TO

Jackson Walker, LLP  
 Attn: Accounts Payable  
 100 Congress, Suite 1100  
 Austin, TX 78701-4099

Thank you for your business.

JOB NUMBER	SERVICE ORDERED BY	DOCKET NUMBER	CASE NAME
8262-1-2	Donna Pirkle	582-08-0007	App. by Hidden View Dairy

<u>DATE TAKEN</u>	<u>DESCRIPTION</u>	<u>QUANTITY</u>	<u>RATE</u>	<u>AMOUNT</u>
	State Office of Administrative Hearings			
	Texas Commission on Environmental Quality			
	Hearing on the Merits, Volumes 1 & 2			
8/19/2008	Original & Two Copies - Regular	282	4.95	1,395.90
8/20/2008	Original & Two Copies - Regular	108	4.95	534.60
	Condensed Transcripts - TCEQ Attorney	2	25.00	50.00
	Condensed Transcripts- Jackson Walker	2	25.00	50.00
	Complimentary ASCII emailed	2	0.00	0.00
	Administrative Expense Fee	1	25.00	25.00

Tax ID # 74-1837735

Delivered 9/8/08

TERMS:      Due on receipt

**Total**      \$2,055.50

**EXHIBIT "B"**