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December 29, 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 29 PM 4:19  
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 Reply to Protestants' Exceptions to 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*

Ms. LaDonna Castañuela

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

2008 DEC 29 PM 4:19

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

BEFORE THE CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**APPLICANT'S REPLY TO PROTESTANTS' EXCEPTIONS TO  
THE PROPOSAL FOR DECISION**

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

COMES NOW, Applicant Hidden View Dairy and files this Reply to Protestants' Exceptions to the Proposal for Decision urging the Commissioners to overrule the Protestants' Exceptions in their entirety, and in support states as follows:

**I.  
INTRODUCTION**

Protestants attempt to rewrite the history of this case by their Exceptions to the Administrative Law Judge's ("ALJ") Proposal for Decision ("PFD"). The weight of evidence, however, rests firmly in support of issuing Applicant's permit, and the Protestants' efforts to defeat Applicant's permit ring hollow. Protestants' Exceptions affirm that Protestants' primary objective throughout this proceeding has been a collateral attack on TCEQ's Chapter 321, Subchapter B CAFO Rules ("2004 CAFO Rules"). As demonstrated by the ALJ, the answers to the issues referred by the Commission are clear, and the result is unchanged: the Dairy's Application meets or exceeds all applicable requirements and the Draft Permit is consistent with the law, is protective of water quality, and should be issued. The ALJ's PFD fully supports this conclusion, and Applicant respectfully urges the Commissioners to overrule Protestants' Exceptions in their entirety, adopt the ALJ's PFD and issue Applicant's permit.

**II.**  
**REPLY TO PROTESTANTS' EXCEPTIONS**

**A. The Dairy's Expansion is Not a New Source or New Discharger and the Draft Permit Does not Authorize a New Source or New Discharger**

1. Third party fields are not subject to a new source/new discharger analysis.

Protestants' arguments regarding a new source/new discharger determination for third party fields is misplaced and beyond the scope of the referred issues in this proceeding. Protestants contend that any field that receives manure for beneficial re-use should be considered a land management unit ("LMU") and part of the CAFO, erasing the established distinction between LMUs and third party fields. Protestants' issue is with the 2004 CAFO Rules, not with the Draft Permit, and Protestants' tortured analysis concerning third party fields is nothing more than a pretext for attacking the 2004 CAFO Rules.<sup>1</sup> Protestants' arguments are unsupported by the law and evidence in this case and provide no basis for denying the Draft Permit.

As the Executive Director stated in his Exceptions to Finding of Fact No. 35, the new source/new discharger analysis applies only to the issuance of permits under the NPDES program, and permits are not issued for third party fields.<sup>2</sup> The 2004 CAFO Rules draw a clear distinction between LMUs and third party fields.<sup>3</sup> Nonetheless, Protestants disingenuously attempt to manipulate the definition of "facility" in an effort to bring third party fields within the NPDES regulatory scheme, but in the end, the law does not change—third party fields are not LMUs, are not a part of a CAFO and are not subject to a new source/new discharger analysis.

Applicant has identified in its permit application every field that it owns, operates or controls and to which it presently intends to apply manure or wastewater, and these fields are

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<sup>1</sup> It should be noted that the rules concerning a Bosque river dairy's CAFO's land application of manure to third party fields are among the most stringent CAFO rules in the State.

<sup>2</sup> See Executive Director's Exceptions to the ALJ's Findings of Fact, p. 1.

<sup>3</sup> See 30 Tex. Admin. Code §§ 321.32(25), 321.42(j).

included in the Draft Permit as LMUs. Any third party fields to which Applicant may contract to apply manure in the future, if any, will be subject to the requirements and procedures specified by the 2004 CAFO Rules and the Draft Permit, but third party fields are not a part of the Dairy.<sup>4</sup> Protestants seek to recast what the law currently requires, and their interjection of third party fields into the new source/new discharger analysis is merely a red herring and a catalyst for improperly attacking and requesting circuitous review and amendment of the 2004 CAFO Rules.

2. The Dairy's equipment is not a new source/new discharger.

Protestants further argue that the Dairy will use its own equipment for application of manure to third party fields, that the equipment is a point source when it applies to fields from which the material may flow into Waters of the United States, and that the use of the equipment makes the Dairy a new source/new discharger. Protestants once again misrepresent the facts and law in this proceeding, and their arguments fail for several reasons. First, the Draft Permit does not regulate or apply to this type of equipment, and Applicant is not required to obtain a permit as to the equipment.<sup>5</sup>

Further, Protestants cite cases from other jurisdictions (9th Cir., 2nd Cir. And E.D. Wash.) to support their position that application of manure by a dairy's own equipment is authorizing "the discharge of contaminants contained in the CAFO waste into Waters in the

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<sup>4</sup> One could imagine the disarray that would ensue if Protestants' perception of the process were a reality and every owner of a field on which manure is applied as fertilizer is either required to sign over "control" of their field to a CAFO before manure could be applied or to obtain a permit to fertilize the crops on the field. Further, Protestants' suggestion that Applicant is intentionally hiding or withholding information as to the identity of third party fields is wholly inaccurate and unsupported by the evidence in this case. Applicant was clear in his testimony that he has applied to some fields in the past that were not subject to the rules and requirements that will be applicable to third party fields under the Draft Permit and that he is not aware at this time what third party fields he may apply to under the Draft Permit, if any. Transcript of the Aug. 19-20, 2008 Hearing on the Merits ("Hearing Transcript"), pp. 46:22 – 48:12.

<sup>5</sup> See generally App. Ex. No. 14; 30 TEX. ADMIN. CODE Ch. 321.

State” to fields which “have not previously been authorized to receive waste.”<sup>6</sup> These cases, however, are not the law in Texas and are not applicable to the Draft Permit. More importantly, none of these cases stand for the idea that the application of manure to fields by a dairy’s equipment for beneficial re-use renders a field, or the equipment applying the manure, a point source. Fields to which manure is applied in accordance with accepted nutrient management principles and applicable rules will not be considered a point source.<sup>7</sup> Additionally, these cases regulate actual discharges into waters of the United States, not potential discharges.<sup>8</sup> Protestants presented no evidence that the Dairy’s manure-spreading equipment has, or would, cause a discharge of pollutants into waters of the United States. To the contrary, the unrefuted evidence in this case demonstrates that Applicant will only land apply manure to third party fields in accordance with the terms of the Draft Permit, applicable rules and nutrient management principles and on the request of the owner of a third party field for beneficial re-use of the manure as a replacement for commercial fertilizer.<sup>9</sup>

Finally, Protestants misrepresent the record in this case by suggesting that it is the Dairy’s equipment that would land-apply manure to third party fields. The evidence demonstrates that Applicant has contracted with separate hauling companies to remove the manure from the Dairy facility and deliver it to third party fields upon request by the owner of the field.<sup>10</sup> Applicant and the hauling companies that deliver manure to third party fields are separate legal entities. The Dairy’s equipment, therefore, is not used to deliver manure to third

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<sup>6</sup> Protestants’ Exceptions, pp. 7-8. See generally *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002); *Concerned Area Residents for the Env’t v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994); *Cnty. Ass’n for Restoration of the Env’t v. Sid Koopman Dairy*, 54 F. Supp.2d 976 (E.D. Wash. 1999).

<sup>7</sup> See generally *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002); *Concerned Area Residents for the Env’t v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994); *Cnty. Ass’n for Restoration of the Env’t v. Sid Koopman Dairy*, 54 F. Supp.2d 976 (E.D. Wash. 1999).

<sup>8</sup> See *Waterkeeper Alliance, Inc. et al v. Environmental Protection Agency*, 399 F.3d 486, 504 (2nd Cir. 2005).

<sup>9</sup> See Hearing Transcript, pp. 50:3 – 51:10, 52:1-18; App. Ex. No. 26, pp. 31:32-44, 34:21-29.

<sup>10</sup> Hearing Transcript, p. 61:4-14.

party fields. Protestants' arguments are wholly unsupported by the law and evidence in this case, are not relevant to the referred issue on the new source/new discharger determination, provide no basis for denying the Draft Permit and should be overruled.

**B. The Draft Permit is Consistent with the TMDL for the North Bosque River Watershed**

1. Protestants misconstrue the TMDL's goals for pollutant reductions as requirements.

Protestants argue that Applicant has not demonstrated that the phosphorus load resulting from issuance of the Draft Permit is consistent with the loading allowed by the TMDL.<sup>11</sup> Protestants further contend that the TMDL-e model was the only scenario that achieved compliance with water quality standards, and consequently, all permits must be consistent with the calculations, assumptions and practices of the TMDL-e model in order to be consistent with the TMDL.<sup>12</sup> Refuting this reasoning, the drafter of the TMDL for the North Bosque River watershed and TCEQ employee, Larry Koenig, testified that the purpose of the TMDL modeling was to determine achievable pollutant reduction goals and enable recommendations of certain best management practices ("BMPs") that dairies could implement through their permits that would achieve the targeted goals of the TMDL and TMDL Implementation Plan and improve water quality in the North Bosque River watershed.<sup>13</sup> Mr. Koenig further testified that Protestants' suggested approach of determining cumulative loadings is not feasible given the nature of CAFOs, which operate like nonpoint sources that discharge sporadically.<sup>14</sup> At no time were practices or measures modeled by the TMDL intended to be mandatory requirements.<sup>15</sup>

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<sup>11</sup> Protestants' Exceptions, pp. 10-11.

<sup>12</sup> *Id.* at 12.

<sup>13</sup> See Hearing Transcript, pp. 211:10-23, 214:15 – 215:19.

<sup>14</sup> *Id.* at pp. 208:4 – 209:18.

<sup>15</sup> *Id.* at 211:24 – 212:9.

Rather, the goals, reductions and BMPs of the TMDL and TMDL Implementation Plan are expressly executed by the 2004 CAFO Rules through individual permits.<sup>16</sup> Consequently, a permit that is consistent with the 2004 CAFO Rules is consistent with the TMDL.<sup>17</sup>

Ignoring this evidence, Protestants contend that a cumulative loading calculation is required and that the TMDL intended to limit the number of dairy cows in the Watershed, that waste application limitations contained in permits must be the same as limitations modeled in the TMDL, that the nutrient content in feed is limited to a 0.4% phosphorus content, and that a minimum of 50% of waste from each dairy must be hauled out of the Watershed.<sup>18</sup> Protestants' contentions, however, are misplaced and unsupported by the evidence.<sup>19</sup> The evidence demonstrates:

- 1) that the expansion of dairies was expressly contemplated by the TMDL and can be consistent with its goals because the pollutant reduction goals do not hinge on the amount of manure produced in the Watershed, but rather, they focus on the management of the manure produced such that water quality will improve irrespective of the number of dairy cows in the Watershed;<sup>20</sup>
- 2) that the phosphorus and nutrient limitations modeled in the TMDL were not intended as specific effluent limitations or requirements but were merely goals;<sup>21</sup>
- 3) that the suggested limitation of the phosphorus content in animal feed to 0.4% is a voluntary BMP, which if utilized by a

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<sup>16</sup> App. Ex. No. 31, pp. 86:3 – 87:9. The 2004 CAFO Rules were carefully reviewed against the TMDL to assure that the Rules are consistent with the TMDL. Hearing Transcript, p. 213:13-17.

<sup>17</sup> Hearing Transcript, pp. 253:24 – 254:3, 255:3-10; App. Ex. No. 31, pp. 86:3 – 87:9; App. Ex. No. 35, pp. 27:25 – 29:7; App. Ex. No. 39, pp. 22:11 – 23:16.

<sup>18</sup> Closing Arguments of Sierra Club and Pritchey Smith, p. 11.

<sup>19</sup> Throughout their Exceptions, Protestants cite to various exhibits which were submitted by Protestants on an offer of proof after they were properly excluded from the record of this case by the ALJ. Applicant objects to Protestants' attempted use of these exhibits and maintains that these documents are not in the record of this case, do not constitute proper evidence and are irrelevant to this proceeding. See Hearing Transcript, pp. 337-366 (regarding arguments and rulings excluding Protestants' Exhibits PS-2 through PS-8, and PS-14 from the record of this proceeding).

<sup>20</sup> Hearing Transcript, pp. 210:19 – 211:2.

<sup>21</sup> App. Ex. No. 49, p. 7.

dairy, could assist in reducing phosphorus concentrations in the Watershed,<sup>22</sup> and

- 4) that the 50% haul-out of manure is an aggregate Watershed-wide goal, not a site specific requirement for each facility.<sup>23</sup>

The evidence further demonstrates that the factors, which the Protestants attempt to cast as “requirements,” are merely considerations that were modeled in formulating the TMDL to determine what might result if certain practices or measures were taken by dairies and other industries in the North Bosque River watershed.<sup>24</sup> Experts presented by Applicant and the Executive Director, including Dr. Lial Tischler, Norman Mullin, P.E., Charles Maguire and James Moore, each unequivocally testified that the Draft Permit is consistent with the TMDL, and the Draft Permit was reviewed and unconditionally approved by the Environmental Protection Agency without objection.<sup>25</sup> In contrast, Protestants presented no witnesses to refute these conclusions.

2. The Draft Permit is consistent with the BMPs set forth in the TMDL.

Protestants’ arguments further ignore the evidence demonstrating that the BMPs required by the Draft Permit are consistent with the goals of the TMDL. Mr. Koenig testified that the 2004 CAFO Rules were expressly intended to implement the goals and recommended practices of the TMDL by requiring dairies to implement and adhere to certain BMPs that reduce pollutants and improve water quality. Consequently, a permit’s compliance with the 2004 CAFO Rules renders a permit consistent with the TMDL.<sup>26</sup> As demonstrated by the ALJ’s PFD, Findings of Fact and Conclusions of Law, the evidence overwhelmingly demonstrates that the

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<sup>22</sup> Hearing Transcript, p. 211:3-9.

<sup>23</sup> See App. Ex. No. 49, p. 6.

<sup>24</sup> Hearing Transcript, p. 211:10-23.

<sup>25</sup> Hearing Transcript, pp. 252:5 – 253:23; App. Ex. No. 35, pp. 35-68, 70:9-14; App. Ex. No. 38; App. Ex. No. 39. Further, TCEQ agronomy expert, Dr. Paul Askenasy, reviewed Applicant’s NMP and concluded that it was valid and consistent with the 2004 CAFO Rules. App. Ex. No. 42, pp. 27:13 – 28:11, 41:17- 42:11.

<sup>26</sup> Hearing Transcript, pp. 211:10-23, 212:10-16, 213:13-17; App. Ex. No. 31, pp. 86:3 – 87:9.

BMPs required by the Draft Permit result in a reduction of all pollutants, including phosphorus. Further, the evidence proves that the Draft Permit complies with the 2004 CAFO Rules and therefore is consistent with the TMDL.<sup>27</sup>

**C. The Draft Permit Complies with Applicable Water Quality Standards and Applicant has Provided Sufficient Information to Enable Meaningful Review of the Application and NMP and Allow Issuance of the Permit**

1. The Draft Permit does not violate dissolved oxygen standards.

Protestants argue that the Draft Permit authorizes a discharge into Green Creek from the RCSs and will add nutrients and increase algal growth in Green Creek, which will impair dissolved oxygen concentrations.<sup>28</sup> Once again, Protestants' contentions consist of mere allegations of legal counsel that are wholly unsubstantiated by the evidentiary record in this case. In fact, many of Protestants' citations throughout their Exceptions are taken out of context in an effort to manipulate the record to support their erroneous analysis.<sup>29</sup>

The Draft Permit's increase of RCS capacity to comply with a 25 year/10 day design storm event standard with a margin of safety renders the possibility for a discharge from a RCS on the Dairy highly remote.<sup>30</sup> Discharges from RCSs are only authorized under extreme rainfall events.<sup>31</sup> Further, the evidence unequivocally demonstrates that the BMPs and land application limitations within the Draft Permit will result in a net *reduction* of all nutrients and consequently,

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<sup>27</sup> See App. Ex. No. 37, att. 1-2; App. Ex. No. 39, pp. 37:20 – 38:2.

<sup>28</sup> Protestants' Exceptions, pp. 13-14.

<sup>29</sup> One example of Protestants' inappropriate citation to the record may be found in footnote 56 in Protestants' Exceptions. In that footnote, Protestants cite three portions of the Hearing Transcript from Dr. Tischler's testimony for the proposition that the "draft permit will add nutrients to Green Creek." See Protestants' Exceptions, p. 14. Looking at Dr. Tischler's testimony fully and in context, it is clear that his testimony does not support Protestants' statements and false assumptions, but rather, he directly states that there is no increase in nutrient loading to the surface water. See Hearing Transcript, p. 287:11-24.

<sup>30</sup> App. Ex. No. 46, p. 18:31-43.

<sup>31</sup> See App. Ex. No. 14, p. 4.

a reduction in algal growth.<sup>32</sup> Protestants' provided no evidence to the contrary. By Protestants' own reasoning, a reduction in nutrients and algal growth will result in an increase (improvement) in dissolved oxygen concentrations.<sup>33</sup> Accordingly, the Draft Permit does not violate dissolved oxygen standards, is protective of downstream uses, complies with water quality standards and should be issued.

2. Applicant has provided sufficient information to enable meaningful review of the application and issuance of the permit.

Relying on the *Waterkeeper Alliance, et al. v. United States Environmental Protection Agency* case, Protestants contend that the terms of Applicant's nutrient management plan ("NMP"), the RCS management plan and the Comprehensive NMP ("CNMP") are effluent limitations and must be available to the public and set forth in the Draft Permit.<sup>34</sup> Protestants further claim that the terms of these plans have not been made fully available to the public for review and are not within the Draft Permit, and as a result, the Draft Permit should be denied issuance.<sup>35</sup> Protestants' reasoning and contentions are once again unfounded, unsupported by the law and evidence in this proceeding and should be overruled.

Protestants' application of the *Waterkeeper* case to Applicant's Draft Permit is misplaced. First, the propositions and conclusions in *Waterkeeper* are not the law applicable to the Draft Permit.<sup>36</sup> Further, even if *Waterkeeper* were applicable to the Draft Permit, Protestants misapply

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<sup>32</sup> See App. Ex. No. 46, p. 16:30-42, 14:8-25.

<sup>33</sup> See Protestants' Exceptions, p. 14 (reasoning that an increase in nutrients will result in increased algal growth and decreased dissolved oxygen concentrations).

<sup>34</sup> Protestants' Exceptions, pp. 14-18.

<sup>35</sup> Protestants' contention of inadequate public participation in this proceeding is particularly astounding, in light of the fact that *Protestants conducted little written discovery, took no depositions, presented no expert testimony and filed no pre-filed testimony of the Protestants themselves.* In fact, *Protestants managed to make it through the entire case without Protestant Pritch Smith ever appearing in person for any part of the proceeding.*

<sup>36</sup> It is important to note that the court in *Waterkeeper* vacated portions of the EPA CAFO rules and remanded portions of the rules for further review and revision by EPA. The impact of this case does not result in an across-the-board change in policy in every state CAFO permitting program. Rather, the EPA is charged with reviewing and revising the CAFO rules. EPA issued the revision of the CAFO rules based on the *Waterkeeper* case on October

the court's analysis and the record demonstrates that the Draft Permit complies with the *Waterkeeper* analysis and the 2004 CAFO Rules. *Waterkeeper* only addressed a NMP, not a RCS management plan or CNMP. Contrary to the Protestants' analysis, a RCS management plan and CNMP are not a part of the NMP.<sup>37</sup> The 2004 CAFO Rules require an RCS management plan to be implemented after issuance of a permit, and the Draft Permit sets forth specific requirements for the Dairy's RCS management plan and a compliance schedule for when the plan must be developed and implemented.<sup>38</sup> To the extent Protestants disagree, their issue is with the 2004 CAFO Rules, not Applicant's permit.

As for the CNMP, Texas law allows an Applicant to maintain the confidentiality of the CNMP.<sup>39</sup> Nonetheless, most of Applicant's CNMP was included within the NMP in the permit application, which was publicly available. Further, Applicant produced its entire CNMP to Protestants during discovery, providing Protestants ample opportunity to review, comment and address any concerns regarding the CNMP.<sup>40</sup>

Finally, Protestants' statement that the NMP was not available to the public during the permitting process and that the terms of the NMP are not included within the permit is utterly false. The NMP is a part of Applicant's permit application, which was filed with the TCEQ and has at all times been publicly available to any person who chooses to review it.<sup>41</sup> Further, the

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31, 2008. Nonetheless, TCEQ has twelve months to bring the 2004 CAFO Rules into compliance and begin applying and enforcing the revised rules concerning CAFO permits. Consequently, the *Waterkeeper* case does not apply to the Draft Permit.

<sup>37</sup> The RCS management plan and CNMP are Texas-specific requirements, and Protestants' attempt to use *Waterkeeper* as support for requiring these documents to be publicly available prior to permit issuance and set forth in the permit is in error. Further, Applicant notes that Protestants' allegation that the RCS management plan is a part of the NMP is incorrect. The RCS management plan is a part of the Dairy's Pollution Prevention Plan, not the NMP. 30 TEX. ADMIN. CODE § 321.42(g); App. Ex. No. 14, p. 9.

<sup>38</sup> 30 TEX. ADMIN. CODE § 321.42(g); App. Ex. No. 14, pp. 9, 31.

<sup>39</sup> TEX. AGRIC. CODE ANN. § 201.006.

<sup>40</sup> See Applicant's Response to Protestants' Motion to Compel, filed May 27, 2008. Applicant produced the CNMP to Protestants in its entirety, bates-labeled APP 1301 through APP 1528.

<sup>41</sup> App. Ex. No. 28, p. APP 0135.

Draft Permit expressly incorporates by reference the entire permit application into the Draft Permit, including the NMP—thereby ensuring that the effluent limitations are included within the Draft Permit.<sup>42</sup> Additionally, a review of the Draft Permit unequivocally establishes that each of the requirements set forth in 40 C.F.R. § 122.42(e) are expressly included as individual terms and conditions in the Draft Permit.<sup>43</sup>

Protestants have had ample opportunity and access to review information concerning the Applicant's operations, the permit application, the NMP and the Draft Permit. To suggest that the public participation in this case is insufficient is simply false. Protestants do not provide any evidence concerning the NMP, the permit application or the Draft Permit that demonstrates the Draft Permit does not comply with water quality standards. Despite having access to all of the documents and the opportunity to critique the NMP, at the hearing the Protestants presented no evidence contradicting the substance of the NMP. To the contrary, as the ALJ's PFD and this Reply repeatedly demonstrate, the Draft Permit complies with applicable law and should be issued.

**D. A Sufficient Anti-Degradation Analysis was Performed and the Draft Permit Complies with the Anti-Degradation Policy**

Protestants completely misstate the applicable anti-degradation analysis in this matter. The anti-degradation analysis consists of three tiers, which may apply depending on the quality and type of waterway at issue in a proceeding.<sup>44</sup> As described by Dr. Lial Tischler, the only anti-degradation review potentially applicable to the Draft Permit is a tier one review, requiring that

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<sup>42</sup> App. Ex. No. 14, p. 2. Further, the Draft Permit requires that the NMP be updated annually to ensure up-to-date land application rates and data. *Id.* at 13.

<sup>43</sup> See generally App. Ex. No. 14 (addressing storage of manure and wastewater, management of mortalities, diversion of clean water from production area, restriction of animal access with surrounding water, proper handling and disposal of chemicals, site specific conservation practices (i.e., buffers) to control runoff, protocols for testing manure, sludge, wastewater and soil, protocols to land apply manure and wastewater, and recordkeeping procedures and requirements).

<sup>44</sup> 30 TEX. ADMIN. CODE § 307.5; App. Ex. No. 52, p. 23.

water quality be maintained so as to protect existing uses.<sup>45</sup> Protestants presented no expert to controvert Dr. Tischler's testimony. Nonetheless, Protestants contend that because certain downstream waters from the Dairy are classified as having a fishable and swimmable quality that a tier two review is required.<sup>46</sup> Protestants, however, are mistaken both as to the definition and application of a tier two anti-degradation analysis and their argument is inherently flawed. The Implementation Procedures for the Texas Surface Water Quality Standards, as well as the testimony of water quality expert, Dr. Lial Tischler, explain that a tier two anti-degradation analysis only applies to waters that *exceed* fishable and swimmable quality or in other words, waters that are high quality, unimpaired or pristine.<sup>47</sup> The evidence in this case demonstrates that Green Creek and the North Bosque River are impaired waters, and consequently, only a tier one review is potentially applicable.<sup>48</sup>

The Protestants' statement that the Draft Permit will increase pollution to the water of the state is similarly unsupported by the evidence in this case. The evidence establishes that the increased capacity of RCSs resulting from the Draft Permit's requirement of a 25 year/10 day design storm event standard significantly decreases the possibility of RCS overflow.<sup>49</sup> Additional BMPS, such as vegetative buffers, further filter out pollutants and prevent degradation of water quality.<sup>50</sup>

Even if the Draft Permit were to authorize a discharge that would add pollution to the receiving waters, TCEQ staff conducted an anti-degradation review that sufficiently considered the potential impacts of such a discharge and determined that no degradation of water quality

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<sup>45</sup> App. Ex. No. 52, p. 23; Hearing Transcript, pp. 303:14 – 304:11.

<sup>46</sup> Protestants' Exceptions, pp. 20-21.

<sup>47</sup> App. Ex. No. 46, p. 15:35-46; App. Ex. No. 52, pp. 23, 30.

<sup>48</sup> Hearing Transcript, pp. 303:14 – 304:11.

<sup>49</sup> App. Ex. No. 46, p. 11:38 – 12:1.

<sup>50</sup> See App. Ex. No. 46, p. 15:9-23.

would result.<sup>51</sup> Although the TMDL for the North Bosque River watershed does not specifically address bacteria, the TCEQ staff's anti-degradation review of the Draft Permit specifically addressed this issue.<sup>52</sup> As Lori Hamilton of TCEQ noted in her analysis and as Dr. Tischler testified, the Draft Permit results in a reduction of all pollutants or potential contaminants, including bacteria.<sup>53</sup> By definition, therefore, no degradation of water quality will result from the Draft Permit or the expanded facility, and the Texas anti-degradation requirements are satisfied.<sup>54</sup>

#### **E. The Draft Permit Includes Adequate Protections for the Control of Pathogens**

Protestants argue that no analysis was conducted to ensure sufficient technology-based limitations are included within the Draft Permit to prevent pathogen contamination of waters surrounding the Dairy.<sup>55</sup> In actuality, the evidence in this case demonstrates that TCEQ conducted a thorough site-specific analysis as to the specific BMPs and control technologies that would reduce all pollutants, including nutrients, bacteria and pathogens.<sup>56</sup> The evidence further shows that the means by which pathogens could reach waters of the state are the same as for all pollutants—through excessive run-off, discharges from RCSs or direct animal contact with waterways.<sup>57</sup> The unrefuted evidence establishes that the BMPs that significantly reduce or eliminate the possibility of water pollution from the Dairy include measures:

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<sup>51</sup> App. Ex. No. 41, p. 2.

<sup>52</sup> *Id.*

<sup>53</sup> See App. Ex. No. 41, p. 2; App. Ex. No. 46, p. 16:32-35. Protestants' quotation of Dr. Tischler's testimony on page 22 of their Exceptions is once again taken out of context and mischaracterizes Dr. Tischler's testimony. Dr. Tischler's testimony is clear that the BMPs required by the Draft Permit will reduce bacteria. Hearing Transcript, p. 310:11.

<sup>54</sup> App. Ex. No. 46, p. 16:32-35.

<sup>55</sup> Protestants' Exceptions, pp. 22-23.

<sup>56</sup> See generally App. Ex. Nos. 35, 37, 39, 42.

<sup>57</sup> App. Ex. No. 46, pp. 17:39 – 18:23, 18:31-43.

- 1) to prevent RCS overflow by increased capacities to the 25 year/10 day design storm event standard with a margin of safety;
- 2) to reduce potential for runoff by increasing vegetative buffers and filter strips between LMUs and waterways and by limiting the amount of wastewater that may be applied to LMUs; and
- 3) to restrict all animal access from waterways by fencing off the entire Dairy property.<sup>58</sup>

Further, Dr. Tischler, a leading water quality expert, testified unequivocally that the Draft Permit includes the “best regulatory controls currently identified to reduce the potential for bacteria and pathogen contamination.”<sup>59</sup> To the extent Protestants believe that additional regulatory controls should be promulgated or required regarding pathogens or bacteria, this is a rulemaking issue with EPA or TCEQ, and the protest of Applicant’s permit is not the forum for Protestants’ concerns. Accordingly, the Draft Permit includes adequate requirements to control bacteria and pathogens, and the Protestants’ Exceptions should be overruled.

**F. The ALJ Did Not Request Findings of Fact from the Parties, and Therefore, No Recommended Rulings Are Required on Protestants’ Findings of Fact**

Protestants contend that the ALJ neglected to include recommended rulings on each of Protestants’ findings of fact as required by 30 Tex. Admin. Code § 80.252(c). Protestants’ argument rests on the mistaken belief that their findings of fact were “provided in response to the ALJ’s request.” The transcript from the hearing on the merits demonstrates that the ALJ left to the discretion of the parties whether to file findings of fact or conclusions of law, as evidenced by the ALJ’s statement in reference to the post-hearing briefing schedule: “[s]o October the 3<sup>rd</sup> for the briefs to be done and reply briefs, along with findings of fact and conclusions of law, *if*

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<sup>58</sup> App. Ex. No. 10, pp. 12:15-18, 18:31-43.

<sup>59</sup> App. Ex. No. 46, p. 18:15-17.

*you want to propose them*, and closing of the record on the 17<sup>th</sup> of October.”<sup>60</sup> The ALJ did not request that the parties file findings of fact, and no order was issued requiring findings of fact. Consequently, the ALJ was not required to provide recommended rulings on each of Protestants’ findings of fact.<sup>61</sup>

### **III. CONCLUSION**

After weeding through the confusing analysis and distortions of fact and law in Protestants’ Exceptions, Protestants do not provide any credible legal or factual basis for denying the Applicant’s permit. Despite their claims of profound deficiencies in the Draft Permit, the Protestants could not muster more than one, single fact witness to present testimony on their behalf. They presented no expert testimony, and most of the documents offered by Protestants as evidence in this case were wholly unrelated to the Draft Permit or the Dairy, were irrelevant to the referred issues and were properly excluded from the proceeding. In the end, the Protestants’ case was never about a concern over the Dairy’s operations, but rather, this proceeding was brought solely as an opportunity for Protestants to obtain a public platform from which to mount a collateral attack against the 2004 CAFO Rules. The end result, however, is clear—the Draft Permit is consistent with applicable law, is protective of water quality and should be issued. The ED, OPIC and the ALJ each agree with this conclusion, and it is fully supported by the record and law in this case. Accordingly, Applicant requests that the Commissioners’ overrule Protestants’ Exceptions in their entirety, adopt and approve the ALJ’s PFD and issue Applicant’s permit.

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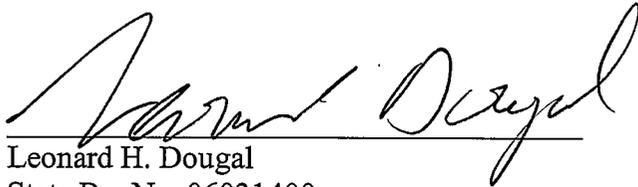
<sup>60</sup> Hearing Transcript, p. 376:6-10 (emphasis added).

<sup>61</sup> 30 TEX. ADMIN. CODE § 80.252(c).

**IV.**  
**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Applicant Hidden View Dairy respectfully prays that the Commissioners overrule Protestants' Exceptions in their entirety, sustain Applicant's Exceptions, adopt the Proposal for Decision as amended, issue Applicant's permit and award such other and further relief to which Applicant may be justly entitled.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that on this 29th day of December, 2008, a true and correct copy of the foregoing document was served on the following parties as indicated below:

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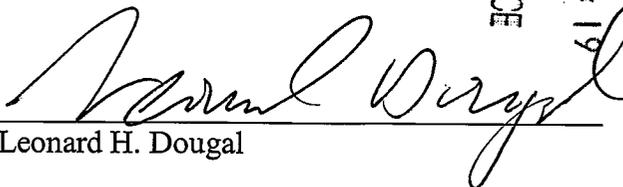
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