

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*
Mark R. Vickery, P.G., *Executive Director*



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

2008 DEC 15 PM 4:15

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY CHIEF CLERKS OFFICE

Protecting Texas by Reducing and Preventing Pollution

December 15, 2008

Via Hand Delivery

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

Re: SOAH Docket No. 582-08-0007; TCEQ Docket No. 2007-0831-AGR;
Application by Hidden View Dairy for TPDES Permit WQ0003197000

Dear Judge Scudday:

Please find attached the Executive Director's Exceptions to the ALJ's Findings of Fact in the PFD in the above referenced matter.

Please let me know if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Brush".

Robert Brush
TCEQ Staff Attorney

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

Via Hand Delivery

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

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Application By
Hidden View Dairy
For Amendment to TPDES
Permit No. WQ0003197000

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Before the
STATE OFFICE of
ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

**EXECUTIVE DIRECTOR'S EXCEPTIONS TO
THE ALJ'S FINDINGS OF FACT**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this exception to the Findings of Fact in the November 24, 2008 Proposal for Decision in this case.

On page 8, Finding of Fact #35 states that because no third party fields are identified by the dairy and are not required to be identified until after the permit is issued, the issue of whether third party fields would constitute new sources or new dischargers cannot be addressed until specific third party fields are identified. The ED notes that, as worded, the finding implies that at such time as third party fields are identified, then it would be appropriate to make a new source/new discharger determination.

The law is clear that no such determination for third party fields would ever be required for this permit application. The federal new source/new discharger determination is for purposes of issuing a new National Pollutant Discharge Elimination System (NPDES) permit. See 40 CFR § 122.29. A permit is not issued for third party fields under the concentrated animal feeding operations (CAFO) rules. Since a permit is not issued, a new source/new discharger determination would not be required either now or when third party fields are identified.

Additionally, if the dairy were to exert sufficient control over third party fields such that the fields were defined as land management units under the CAFO rules, then the addition of those fields to Hidden View Dairy's permit would constitute a dairy expansion. 40 CFR § 122.29 exempts facility expansions from the new source/new discharger determination. As noted in Finding of Fact #33, the facility is an existing, previously permitted dairy CAFO. Therefore, under no circumstances would the dairy's

use of a third party field require a new source/new discharger determination. The ED recommends changing Finding of Fact #35 to state:

Third party fields used by the Dairy do not require a new source or new discharger determination because permits are not issued for third party fields.

As an additional alternative, the ED suggests dropping the reference to the new source/new discharger determination and simply stating for the reasons noted, no issues exist in this proceeding with respect to third party fields.

The ED respectfully requests consideration of the ED's comments and suggested modifications regarding Finding of Fact #35.

Respectfully Submitted,

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Mark R. Vickery, P.G., Executive Director

Robert Martinez, Director
Environmental Law Division



Robert D. Brush, Staff Attorney
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State Bar No. 00788772

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CERTIFICATE OF SERVICE

I certify that on December 15, 2008, the "Executive Director's Exceptions to the ALJs Findings of Fact" in this matter was served to all parties in this case via hand delivery, facsimile transmission, inter-agency mail, or by U.S. Mail.



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