Buddy Garcia, *Chairman*
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Mark R. Vickery, P.G., *Executive Director*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

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CHIEF CLERKS OFFICE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 29, 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 Response to Exceptions to the ALJ's Proposal For Decision" in the above referenced matter.

Please let me know if you have any questions.

Sincerely,

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

Eric Allmon
Loweree, Frederick, Perales, Allmon & Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701-4386
Fax – (512) 482-9346

Via Fax & U.S. Mail

Leonard Dougal
Jackson Walker L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
Fax – (512) 236-2002

Via Fax & U.S. Mail

Garrett Arthur
TCEQ Public Interest Counsel
MC-103
12100 Park 35 Circle
Austin, Texas 78753
Fax – (512) 239-6377

Via Fax & Interoffice Mail

Ms. LaDonna Castañuela (with 7 copies)
TCEQ Chief Clerk
MC-105
12100 Park 35 Circle
Austin, Texas 78753

Via Hand Delivery

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COMMISSION
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QUALITY

2008 DEC 29 PM 3:26

CHIEF CLERKS OFFICE

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

Application By	§	**Before the**
Hidden View Dairy	§	**STATE OFFICE of**
For Amendment to TPDES	§	**ADMINISTRATIVE HEARINGS**
Permit No. WQ0003197000	§	

EXECUTIVE DIRECTOR'S RESPONSE TO EXCEPTIONS TO THE ALJ'S PROPOSAL FOR DECISION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to exceptions to the ALJ's November 24, 2008 Proposal for Decision (PFD).

In this response, the ED seeks to clarify for the record, the arguments made by the Sierra Club and Dr. Pritchty Smith's in their exceptions to the PFD. The record in this case does not support the legal theories and conclusions asserted in the Sierra Club and Dr. Smith's exceptions. As is obvious from reading their exceptions, they are contesting not factual issues, but the ED's interpretation of various TCEQ and EPA rules and the Total Maximum Daily Load (TMDL) for the North Bosque Watershed. Issues of law are not before the ALJ in this proceeding. *See* 30 TAC § 55.211(c)(2)(A).

Additionally, the Sierra Club and Dr. Smith filed exceptions that are not limited to the issues referred in this case. Exceptions were filed on issues that were raised in Sierra Club's comments and hearing request, but were not referred by the Commission to SOAH. The ED recommends not including the Sierra Club and Dr. Smith's exceptions, Findings of Fact, or Conclusions of Law in the PFD as explained in the following pages.

The ED agrees with Hidden View Dairy's exceptions to Finding of Fact #54, #64, and #65 and would encourage the suggested changes be adopted. Additionally, the ED does not have any objection to including Hidden View Dairy's new Finding of Fact #35.

1. Hidden View Dairy is not a "new source"

The ED noted in his closing arguments that the applicable federal rule defines "new source" as:

> Any building structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced: (A) after promulgation of standards of performance under CWA, § 306, or (B) after proposal of standards of performance in accordance with CWA, § 306, which are applicable to such source, but only if the standards are promulgated in accordance with § 306 within 120 days of their proposal.[1]

Also, besides meeting the above definition, the federal rules identify additional criteria for determining whether an applicant is a "new source" for purposes of the federal regulations:

1. It is constructed at a site where no other source is located;
2. It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
3. Its processes are substantially independent of an existing source at the same site (In making this determination, factors to consider include to the extent the new facility is integrated with the existing facility and to the extent the new facility is engaged in the same general activity as the existing source).[2]

In pre-file testimony for the hearing, Dr. Lial Tischler testified that a "new source" is one that starts construction after EPA has promulgated new source performance standards for its point source category and subcategory under the authority

[1] 40 CFR § 122.2.
[2] 40 CFR § 122.29(b).

of Section 306 of the Clean Water Act.[3] Dr. Tischler also testified that under the federal regulations at 40 CFR § 122.29 a "new source" is 1) a "green field" site constructed after new source performance standards for its category have been promulgated or; 2) it totally replaces an existing production facility; or 3) it is constructed at the site of an existing source, but is "substantially independent" of the existing source.[4] Additionally, Dr. Tischler testified that expansion of the number of animals at a dairy does not make it a "new source;" nor does expansion of the existing RCSs.[5]

In pre-file testimony for the hearing, William DeJong testified that after he purchased the dairy he filed a notice of intent on May 9, 1994 for coverage under EPA's CAFO general permit and that EPA issued an authorization under that general permit on July 1, 1994.[6] Mr. DeJong also testified that the only expansion proposed by the dairy, other than the number of cows, is the expansion of the RCSs (ponds) to accommodate the enhanced requirements in the draft permit.[7]

In other pre-file testimony for the hearing, Norman Mullin, P.E. testified that the expansion proposed by Hidden View Dairy is to increase the number of cows to a maximum of 3,000, but that no new animal housing or waste management structures will be built.[8] Additionally, he testified the only significant physical modification of the facility will be the expansion of the RCSs to meet the 25-year, 10-day rainfall standard implemented in the 2004 CAFO rules.[9]

Additionally, EPA indicated it had "no objection" to issuing of the draft permit, indicating that the Applicant was in compliance with the applicable federal regulations regarding "new source" and "new discharger."[10]

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[3] HV #46, Pre-Filed Testimony of Dr. Lial Tischler, PH.D., P.E., D.E.E., page 8, lines 14-16.
[4] *Id.*, page 8, lines 20-27.
[5] HV #46, Pre-FiledTestimony of Dr. Lial Tischler, PH.D., P.E., D.E.E., page 9, lines 9-18.
[6] HV #10, Pre-filed testimony of William N. DeJong, page 2, lines 16-36.
[7] HV #10, page 4, line 17 through page 5, line 7.
[8] HV#26, Pre-filed testimony of Norman H. Mullin, P.E., page 12, lines 20-27.
[9] *Id.*
[10] ED #12, EPA "No Objection" Letter.

Hidden View Dairy is not a "new source" or "new discharger" under the federal rules. An increase in cows and an increase in the size of the RCSs do not meet the applicable regulatory requirements.[11] Furthermore, as Mr. DeJong noted above, the dairy was previously permitted under EPA's CAFO general permit.[12]

2. Third party fields and equipment are not "new sources"

As pointed out in the ED's exceptions to the ALJ's Findings of Fact in the PFD, the law is clear that no such determination for third party fields would ever be required for this permit application. This would also apply to the equipment. 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 NPDES or Texas Pollutant Disposal Elimination System (TPDES) permit is not issued for third party fields or equipment 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 and this is also true for the equipment used by the dairy.

The Sierra Club and Dr. Smith's legal interpretation for both third party fields and equipment also relies on the conclusion that all runoff from third party fields are point source discharges. This ignores the agricultural exemption in the Clean Water Act (CWA) that exempts non-point source runoff, including storm water runoff. The exemption covers runoff from orchards, cultivated crops, pastures, range lands, and forest lands. Such discharges are non-point sources, not regulated under the CWA, not permitted, and thus, do not require a new source/new discharger determination. *See* 40 CFR § 122.3(e).

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[11] ED #8, ED's Response to Comments, pages 2-4.
[12] HV #11, May 9, 1994 Notice of Intent filed with EPA and HV #12, July 1, 1994 Letter issuing EPA permit no. TXG010522 to Hidden View Dairy.

3. Off-site waste application fields controlled by Hidden View Dairy

As the Sierra Club and Dr. Smith note, a discharge from a waste application field controlled by the Applicant would constitute a "point source." However, as noted in the ED's exceptions to the ALJ's PFD, such fields would be defined as land management units (LMUs) under the CAFO rules and would be required to be covered under Hidden View Dairy's CAFO permit. Adding such fields to the permit would constitute a dairy expansion. 40 CFR § 122.29 exempts facility expansions from the new source/new discharger determination. Therefore, under no circumstances would the dairy's use of a field, controlled by the dairy or not, require a new source/new discharger determination.

4. Implementation of the TMDL for the North Bosque Watershed

As noted in the ED's closing arguments, individual dairy CAFO permits are required to be consistent with the North Bosque River TMDL[13] and TMDL Implementation Plan.[14] Charles Maguire, the TCEQ CAFO team leader, testified that the 2004 CAFO rules implemented the North Bosque TMDL Implementation Plan through the special requirements in 30 TAC § 321.42.[15] Mr. Maguire also testified that the draft permit was consistent with the CAFO rules and that the CAFO rules were consistent with the TMDL and TMDL Implementation Plan.[16] Additionally, James Moore, TCEQ Permit Coordinator for this permit application, also testified that the draft permit was consistent with the TMDL and TMDL Implementation Plan.[17]

The Sierra Club and Dr. Smith ignore the evidence on the record in this case and offer an alternative interpretation of how the TMDL should be interpreted. For example, they state that EPA has never approved the Chapter 321 rules as implementing the TMDL nor has it approved the TMDL implementation plan, while ignoring the evidence that is

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[13] HV #33.
[14] HV #34.
[15] ED #13, Deposition of Charles Maguire, page 22, line 11 through page 23, line 23.
[16] *Id.* Page 37, line 23 through page 38, line 2.
[17] ED #1, Pre-Filed Testimony of James Moore, page 3, line 43 through page 4, line 42.

on the record that EPA did not object to the issuing of *this* permit.[18] As argued by the Sierra Club and Dr. Smith, they are contesting issues of law relating to the ED's implementation of the TMDL, not fact issues related to the draft permit at issue.

5. The applicable water quality standards will be met by the draft permit

As the ED noted in his closing arguments, Hidden View Dairy is located in the North Bosque River Watershed in Segment 1226 of the Brazos River Basin.[19] The designated uses and dissolved oxygen criterion as stated in Appendix A of the Texas Surface Water Quality Standards (30 TAC § 307.10) for Segment 1226 are contact recreation, public water supply, high aquatic life use, and 5.0 mg/l of dissolved oxygen.[20]

The ED does not expect water quality impacts to occur from land application based upon properly implemented nutrient management practices.[21] Instead of numeric water quality based effluent limitations; the draft permit establishes best management practices (BMPs) to restrict discharges to those that occur only during defined chronic or catastrophic rainfall events or catastrophic conditions.[22] Discharges occurring during these catastrophic conditions are highly intermittent in nature and should be significantly diluted by the amount of rainfall runoff.[23]

In pre-file testimony for the hearing, Mr. Mullin testified that the entire purpose of 30 TAC § 321.42 was to protect water quality in areas with impaired water quality.[24] Additionally, Mr. Mullin testified that the requirements included in § 321.42 to address water quality included increased pond size, an RCS management plan, a comprehensive nutrient management plan, irrigation time limits, vegetative buffers, filter strips, and contour buffers.[25]

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[18] ED #12, EPA "No Objection" Letter.
[19] ED #11, TCEQ Memo – Water Quality Assessment Regarding Hidden View Diary, 4/27/06.
[20] *Id.*
[21] ED #5, Fact Sheet and Executive Director's Preliminary Decision, page 20.
[22] *Id.*
[23] *Id.*
[24] HV #26, Pre-Filed Testimony of Norman Mullin, P.E., page 8, lines 25-46.
[25] *Id.*

In his pre-file testimony for the hearing, Dr. Tischler testified that based on his familiarity with Green Creek and the North Bosque and the water quality issues associated with each,[26] his evaluation of the draft permit led him to conclude that issuance of the permit would be a step toward improving water quality in the North Bosque River watershed.[27] Dr. Tischler noted a number of specific provisions implemented in the draft permit designed to reduce pollutant loading in the North Bosque River watershed that lead him to conclude that the draft permit was protective of downstream uses.[28]

TCEQ's Water Quality Assessment Section review concluded that the implementation of the additional requirements in 30 TAC § 321.42 for dairy CAFOs included in the draft permit were expected to: "...preclude a permitted increase in pollutant loadings from this facility, so that the permit is consistent with the requirements of the antidegradation implementation procedures in 30 TAC §307.5(c)(2)(G) of the Texas Surface Water Quality Standards."[29]

6. The Nutrient Management Plan (NMP) and the draft permit

To make the case for this exception, the Sierra Club and Dr. Smith argue:

> The NMP required by the permit has not been provided in this case, and so it is not possible for the public to meaningfully evaluate the permit.[30]

As noted in the record for this case, the ED stated in his response to comments (RTC) that the ED is requiring North Bosque dairies, including Hidden View Dairy, to submit their NMPs with their permit applications. The ED noted in his RTC, filed on

[26] HV #46, Pre-Filed Testimony of Dr. Lial Tischler, PH.D., P.E., D.E.E., page 12, line 18 through page 14, line 6.
[27] Id., page 14, lines 8-25.
[28] Id., page 14, line 27 through page 15, line 23.
[29] ED #11, TCEQ Memo – Water Quality Assessment Regarding Hidden View Diary, 4/27/06.
[30] Exceptions of Sierra Club and Dr. Smith, pg. 15.

April 26, 2007, that the NMP for Hidden View was submitted and reviewed by the ED; and was available for public review.[31] The NMP was also filed as an exhibit by Hidden View Dairy with their pre-filed case on May 30, 2008.[32] Additionally, at the hearing the following exchange took place between the attorney representing the Sierra Club and Dr. Smith and Norm Mullin, P.E. the consultant for Hidden View Dairy's CAFO permit application:

Q: (BY MR. ALLMON) What is Exhibit 30, Applicant's Exhibit 30?

A: That is the revised NMP.

Q: Okay, could you look at Page 23 of that revised NMP?

A: Okay.[33]

Hidden View Dairy is required to implement the certified NMP upon issuance of the permit, which "incorporates" its requirements into the permit.[34] No evidence was presented by the Sierra Club and Dr. Smith that the NMP was not reviewed by the ED and its requirements incorporated into the draft permit.

7. The RCS Management Plan and the Comprehensive Nutrient Management (CNMP) and the draft permit

These issues were raised by the Sierra Club in their public comments and in their hearing request.[35] However, the Commission declined to refer these issues to SOAH, so there is no basis for the Sierra Club and Dr. Smith to ask the ALJ or Commission to include rulings on non-referred issues in the PFD.

[31] ED #8, Executive Director's Response to Comment, page 13
[32] HV #30, Waste Utilization Plan and Nutrient Management Plan dated May 13, 2008.
[33] Hearing on the Merits Transcript, page 117, lines 4-8.
[34] ED #4, Draft TPDES Permit for Concentrated Animal Feeding Operation, page 13.
[35] ED #8, ED's Response to Comments, pages 12-14.

However, the ED notes that Hidden View Dairy is required to develop and implement an RCS Management Plan[36] upon issuance of the permit and was required to develop and implement a CNMP no later than December 31, 2006.[37]

8. The anti-degradation analysis for the draft permit

As noted by the ED in his closing arguments, each dairy CAFO permit application is reviewed by TCEQ's Water Quality Assessment section to determine whether the permit is consistent with the requirements of the anti-degradation implementation procedures in 30 TAC § 307.5(c)(2)(G) of the Texas Surface Water Quality Standards. That rule provision states:

> The antidegradation policy and the general provisions for implementing the antidegradation policy apply to the determination of TMDLs and to waste load evaluations which allow an increase in loading. If the TMDL or waste load evaluation indicates that degradation of waters exceeding fishable/swimmable quality is expected, the public hearing notice will so state. Permits which are consistent with an approved TMDL or waste load evaluation under this antidegradation policy will not be subjected to separate antidegradation review for the specific parameters that are addressed by the TMDL or waste load evaluation.[38]

In his pre-file testimony, Dr. Tischler testified that TCEQ performs an anti-degradation analysis for every TPDES permit to assure that the permit limits and conditions do not cause or contribute to any impairment of a designated or existing use or exceedance of any applicable water quality standard when such standards and uses are being achieved.[39]

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[36] ED #4, Draft TPDES Permit for Concentrated Animal Feeding Operation, page 31.
[37] 30 TAC § 321.42(s).
[38] 30 TAC § 307.5(c)(2)(G).
[39] HV #46, Pre-Filed Testimony of Dr. Lial Tischler, PH.D., P.E., D.E.E., page 15, line 27 through page 16, line 4.

Dr. Tischler also testified that the anti-degradation memo prepared by the ED accurately characterizes the provisions of the draft permit that will result in significant net decreases in the quantities of all pollutants that are authorized for discharge by the dairy operations.[40] He further noted that when a permit requires lower discharges for all the pollutants generated by a source compared to what has been authorized under a previous permit, by definition, there will be no significant degradation of existing water quality and the anti-degradation policy requirements are satisfied.[41]

TCEQ's Water Quality Assessment Section performed their anti-degradation review and indicated in their memo prepared by Lori Hamilton and dated April 27, 2006[42] that the implementation of the additional requirements for dairy CAFOs located in a major sole source impairment zone that were included in the draft permit were expected to "preclude a permitted increase in pollutant loadings from this facility, so that the permit is consistent with the requirements of the antidegradation implementation procedures in 30 TAC §307.5(c)(2)(G) of the Texas Surface Water Quality Standards."[43]

The Sierra Club and Dr. Smith reference Dr. Tischler's testimony that people can both swim and fish in Green Creek. The Sierra Club and Dr. Smith then note that contact recreation and high quality aquatic life are designated uses for the North Bosque River. They further state the 2008 Texas Water Quality Inventory indicates that the North Bosque River supports fishable/swimmable uses. Thus, the Sierra Club and Dr. Smith concluded a Tier 2 anti-degradation review was required for Green Creek and the North Bosque River.[44] However, these statements are not a substitute for evidence to refute or challenge the rest of Dr. Tischler's testimony in that particular answer or his testimony regarding what tier antidegradation review for this permit is required. That testimony states:

Q; (By Mr. Allmon): Is Green Creek suitable for fishable/swimmable uses?

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[40] HV #46, Pre-Filed Testimony of Dr. Lial A. Tischler, PH.D., P.E., D.E.E., page 16, lines 30-35.
[41] *Id.*, page 16, lines 40-42.
[42] ED #11.
[43] *Id.* Page 2, second paragraph.
[44] Exceptions of Sierra Club and Dr. Pritchy Smith, page 21.

A: Yes, and that is a Tier I evaluation.

Q: So it's your testimony that a Tier 2 evaluation is not necessary in this case?

A: Yes. If you look at the water quality implementation -- water quality standards implementation procedures, the assumed or presumed designated use of an unclassified segment that's intermittent with perennial pools is a limited aquatic life use. And they [TCEQ] apply Tier I protection for that type of segment. A Tier 2 doesn't apply.

Q: And, thus, in your opinion, Tier 2 did not apply to this permit?

A: Well, not for that reason, with respect to any pollutant that's regulated under a TMDL, i.e. the water is impaired, then the antidegradation policy does not apply at all because the TMDL is designed to achieve essentially what the Tier I protection is.[45]

Also, the Sierra Club and Dr. Smith note that Lori Hamilton, the author of the anti-degradation analysis, was not available for cross-examination at the hearing. The ED notes that Ms. Hamilton's memo was admitted as evidence for the truth of the matter asserted without objection[46] from the Sierra Club and Dr. Smith. There was no pre-file or deposition testimony from Ms. Hamilton. Therefore, there was no testimony by Ms. Hamilton for the Sierra Club and Dr. Smith to cross-examine. However, the Sierra Club and Dr. Smith had the option of subpoenaing Ms. Hamilton, if they determined her direct testimony was required at the hearing.

9. Adequacy of requirements in the draft permit for the control of pathogens

As noted by the ED in his closing arguments, the basis of this issue is that Sierra Club asserts that TCEQ did not satisfy 40 CFR § 122.44(d)(1)(vi), which requires states to establish numeric effluent limitations or other types of concentration-based effluent limitations in some circumstances.[47] That rule states:

[45] Hearing on the Merits Transcript, page 303, line 17 to page 304, line11.
[46] Memo admitted as ED exhibit #11.
[47] ED #8, ED's Response to Comment, page 14.

> Where a State has not established a water quality criterion for a specific chemical pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative criterion within an applicable State water quality standard, the permitting authority must establish effluent limitations using one or more of the following options....[48]

These effluent limitations do not have to be specific discharge limits because the federal regulations also allow states to use BMPs where numeric effluent limitations are infeasible.[49] In the case of North Bosque dairies, they are only authorized to discharge in the event of a chronic rainfall event that exceeds the 25-year, 10-day storm event.[50] If such a chronic storm event occurs, the amount of rainfall involved and any resulting discharge will be highly variable both in volume and concentration of waste.[51] Discharges from chronic rainfall events are not comparable to the continuous discharges from municipal wastewater treatment plants or industrial facilities.[52] Therefore, it is impracticable to develop and apply numeric effluent limitations to infrequent, highly variable discharges that may never occur at CAFOs.[53] Instead, the draft permit establishes BMPs, incorporated from the CAFO rules into the permit provisions, to restrict discharges to occur only during defined chronic or catastrophic rainfall events or catastrophic conditions.[54]

In his pre-file testimony, Dr. Tischler testified that surface water quality standards regulate concentrations of pathogens, including bacteria, through the contact recreation standard and that indicator bacteria (e.g. fecal coliforms) are the specific form of bacteria

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[48] 40 CFR § 122.44(d)(1)(vi).
[49] 40 CFR §122.44(k) and § 122.44(k)(3).
[50] 30 TAC § 321.42(c)(1).
[51] ED #8, ED's Response to Comment, page 14.
[52] *Id.*
[53] *Id.*
[54] ED #5, Fact Sheet and Executive Director's Preliminary Decision, page 20.

regulated by the Texas surface water quality standards.[55] Dr. Tischler noted that pathogens are not directly regulated.[56]

Additionally, Dr. Tischler testified that, in his opinion, the draft permit included adequate controls for pathogens and bacteria.[57] Dr. Tischler explained that the draft permit would control pathogens through the stringent limitations and conditions in 30 TAC Chapter 321 being included in the permit requirements and that these requirements reduce the likelihood of all discharges of pollutants, including bacteria.[58]

TCEQ's Water Quality Assessment Section indicated in their memo that the implementation of BMPs (management measures) recommended in the TMDL Implementation Plan, will also have some corollary effect on reducing bacteria loading.[59] The memo noted that reduction of bacteria loading would result from the control of phosphorus since the non-point source nutrient and bacteria loads largely originate from the same sites and materials; and are transported via the same processes and pathways.[60]

The ED recommends finding that the draft permit includes adequate requirements for the control of pathogens and bacteria and is in compliance with the applicable rules and regulations regarding controlling pathogens and bacteria.

10. Sierra Club and Dr. Smith's Findings of Fact and Conclusions of Law

The Findings of Fact and Conclusions of Law proposed by the Sierra Club and Dr. Smith seek to include their legal theories regarding new sources and new dischargers. The Findings of Fact and Conclusions of Law under Section I should not be included because the facility, third party fields, and equipment are not subject to a new source/new discharger determination as supported by the evidence on the record in this case.

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[55] HV #46, Pre-Filed Testimony of Dr. Lial Tischler, PH.D., P.E., D.E.E.page 4, lines 14-19.
[56] *Id.* Page 4, line 19.
[57] *Id.* Page 18, lines 25-29.
[58] *Id.* Page 18, lines 31-43.
[59] ED #11, TCEQ Memo – Water Quality Assessment Regarding Hidden View Diary, 4/27/06.
[60] *Id.* Page 2.

Therefore, the Sierra Club and Dr. Smith's proposed Finding of Fact and Conclusions of Law should not be included in the PFD.

11. Hidden View Dairy's recommended changes to Findings of Fact #54, #64, and #65.

The ED supports the suggested changes by Hidden View Dairy to these three Findings of Fact. The suggested change to #54 would clarify that the draft permit decreases the potential for discharge rather than decreasing the actual amounts of pollutants. This change is appropriate because the dairy is not projected to decrease the amount of waste. However, through the enhanced permit terms from their current authorization, the draft permit is expected to better manage and control waste.

The suggested word change in #64 and #65 from "loadings" to "yield" is also appropriate in this context of this proceeding "loading" suggests instream loading of pollutants. While an increase in cows will increase the amount of phosphorus produced, the draft permit intends to decrease the amount of instream loading through the use of best management practices (BMPs) and other requirements.

12. Hidden View Dairy's suggested new Finding of Fact #35.

The ED has no objection to including the suggested new Finding of Fact #35 because the statement that the application of manure to a third party field does not make the field a LMU is accurate. The TCEQ CAFO rule definition of LMU specifically excludes "...lands not owned, operated, controlled, rented, or leased" for the purposes of off-site land application of manure, whether the waste is given away or sold for land application.[61] So, by definition under the CAFO rules the act of land application on a field does not make it a LMU. The distinction between LMUs and third party fields is the level of control exercised over the area of land application by the CAFO operator.

[61] 30 TAC § 321.32(25).

The ED would also support his recommended change to Finding of Fact #35 (or as some different numbered Finding of Fact) that would state that third party fields used by the Hidden View Dairy do not require a new source or new discharger determination because permits are not issued for third party fields.

The ED appreciates the Commission and ALJ's consideration of this response.

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
Environmental Law Division
State Bar No. 00788772

Representing the Executive Director
of the TCEQ
P.O. Box 13087, MC-173
Austin, Texas 78711-3087
(512) 239-5600, (512) 239-0606 (fax)

CERTIFICATE OF SERVICE

I certify that on December 29, 2008, the "Executive Director's Response to Exceptions to the ALJs Proposal For Decision" in this matter was served to all parties in this case via hand delivery, facsimile transmission, inter-agency mail, or by U.S. Mail.

Robert Brush, Staff Attorney
Environmental Law Division
State Bar No. 00788772
P.O. Box 13087, MC 173
Austin, Texas 78711-3087
Phone (512) 239-5600
Fax: (512) 239-0606

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