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December 29, 2008

CHIEF CLERKS OFFICE

2008 DEC 29 PM 4:44

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

Via Facsimile and U.S. Mail

Ms. LaDonna Castañuela
Texas Commission on Environmental Quality
Office of the Chief Clerk, MC 105
P.O. Box 13087
Austin, Texas 78711

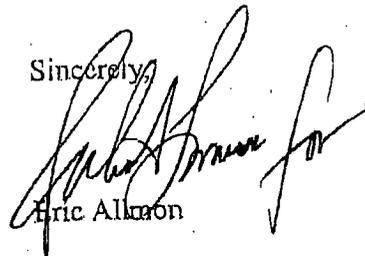
Re: **Application by Hidden View Dairy for TPDES Permit No. WQ03197,
TCEQ Docket No. 2007-0831-AGR, SOAH Docket No. 582-08-0007.**

Dear Ms. Castañuela,

Please find enclosed for filing an original and seven copies of the **Reply to
Exceptions to the Proposal for Decision of Sierra Club and Dr. Pritch Smith** in the
above-referenced matter.

If you have any questions please call.

Sincerely,



Eric Allmon

Enclosures

cc: Service List

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

IN THE MATTER OF THE
APPLICATION OF HIDDEN VIEW
DAIRY FOR TCEQ WATER QUALITY
PERMIT NO. 03197

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY

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REPLY TO EXCEPTIONS OF THE EXECUTIVE DIRECTOR & APPLICANT
BY PROTESTANTS SIERRA CLUB AND DR. PRITCHY SMITH

I. INTRODUCTION

Protestants arguments for denial of the permit are provided in their Exceptions and will not be repeated here. Protestants need, however, to respond to the Exceptions of the Executive Director and Applicant regarding off-site application fields and transcript costs.

II. OFF-SITE APPLICATION FIELDS

A. Summary: The position of the Executive Director and Applicant on off-site application fields is contrary to state law and TCEQ rules.¹

Both the Applicant and the Executive Director object to any proposed finding by the ALJ that leaves open the possibility that a new source/new discharger determination is appropriate for an application field not specifically designated in the current application or permit as a Land Management Unit. Yet, the applicant has admitted that new application fields will be and must be used to manage all of the wastes. As, point sources, new (or existing) off-site fields under the control of Applicant, must be subject to the permitting process, if not now, then at least as amendments. The undisputed evidence from the testimony of the Applicant, however, makes off-site fields point sources now, and as such must be included in the current hearing process and permit.

¹ Moreover, if adopted by the Commission, the ED's position would cause the Texas CAFO program to conflict with Federal requirements for state CAFO programs and require EPA to withdraw its approval of the Texas CAFO program authorization.

B. Factual Basis for Argument: Protestants' Exceptions set out most of the undisputed facts on page 4 - 6, including:

- * Applicant knows the location of the off-site fields,
- * Applicant did not identify them in the application or in the evidence,
- * The ED did not review any information on the fields or the degree of Applicant's control,
- * The Applicant's experts did not review the control of or impacts from the off-site fields, and
- * The Applicant intends to use its equipment, its companies or employees, etc. at the off-site fields.

In addition to admitting that there would be off-site fields, the Applicant explained that they are needed because of insufficient capacity at the CAFO.

Q (Allmon): [I]s there enough acreage on site to apply all of the waste that will be produced by these dairy operations? Is there enough acreage?

A (DeJong): **Do I farm enough land to agronomically uptake the nutrients that the dairy produces? No, there's not.**

Q: So what do you plan to do with the nutrients that are not applied on site?

A: Like I'm currently doing, they are going to either third-party fields within the watershed, third-party fields outside the watershed or to compost plants and the biogas plant.²

C. Argument: If adopted, the positions of the ED and Applicant would prevent effective review of the CAFO permit or participation by the affected public and EPA in decisions on the permit. They would possibly even prevent the Commissioners from such a review and proper evaluation of the interpretation of TCEQ rules by the ED. Thus, there would be no participation or review of determinations by the ED of:

- 1) Whether an off-site is an LMU or third-party field, and
- 2) What conditions, if any, need to be placed on the use of the field to protect water quality.

² Tr. V. 1, p. 44, l. 7 - 18.

Such determination would not be subject to public notice or, apparently, even notice to EPA. Without such notice, there would not even be an opportunity for public comments or for a motion to reconsider an ED decision on how the ED is interpreting the rules on off-site fields. The Commission would never even get a chance to interpret its rules. In fact, it appears from Mr. DeJong's testimony, that the Applicant is already using off-site application fields that have not been identified in the application or draft permit.

There is no prohibition in the permit on the use of off-site fields, be they under the control of the applicant or not. Thus, the Applicant is free to use either type, and the only review of their use or the degree of control will be an ED review, if the position of the ED is adopted.

The ED's determination of whether an off-site field, which is identified after the permit is issued, is an LMU or a third-party field depends upon the degree of control by the permittee. It is in part, a factual determination. As the ALJ has noted, until the fields are identified and the related contracts or control documents are available, "there can be no determination whether such fields would be under the control of the CAFO." (PFD, page 12)

Stricter requirements apply to fields under the control of a CAFO. Such off-site fields are point sources. They must be identified and covered specifically in a TPDES/NPDES permit. Public review and participation on decisions on such sources is required as part of the decision on a permit or other authorization under both state and federal law.

Moreover, since both EPA and the public are required by federal law to have the ability to enforce NPDES permits or the state equivalent, TCEQ's CAFO permits must comply with federal standards for such permits. No permittee can or should be made immune from enforcement under federal law by a state process that limits such enforcement through the permitting process..

Even if the off-site fields are not under the control of the Applicant, the ED's position that "a permit is not issued for third party fields" is incorrect. They may not be point sources, but the application of waste originating at the CAFO to these third-party fields has to be and is authorized under specific permit conditions, such as those proposed by the permit now under consideration. (See, for example, the Draft Permit, ED Exh. 4, Technical Requirements Section VII (A)(8)(e), pages 15-17.) Moreover, a violation of these conditions constitutes a violation of the permit.³ (If the permit does not authorize the application of the CAFO waste to the third-party fields, what document or rule does?)

In this case, the evidence is clear. Some, if not all, of the off-site application fields are under the control of the Applicant and must be considered part of the CAFO and point sources. That is true, not merely by virtue of the level of Applicant's control, but also by virtue of the need the Applicant has for these fields. Applicant lacks the capacity at the CAFO to assimilate the nutrients produced at the dairy at its on-site fields.

In adopting the current CAFO rules, the TCEQ stated:

The CAFO permit establishes all necessary land application capacity consistent with the production of the CAFO, including a specific description of the LMUs in the permit. Any additional third-party land application will represent *excess capacity* to provide for more sound waste management by existing dairy CAFOs.⁴

Applicant has admitted to the lack of capacity at the CAFO and the need for the off-site fields. Those fields will be operated by the Applicant with its equipment. There are point sources that have to be included in the application and covered explicitly by the permit.

Protestants are not asserting that truly independent farming operations obtaining only the quantities of waste needed to grow a desired crop in consideration of the nutrients already

³ Both the permit and TCEQ rules make that clear for third-party fields.

⁴ 29 Tex. Reg. 6652, 6692 (July 9, 2004).

available in the soil are or should be regulated as point sources. Such operations fall within the permit exemption for non-point source agricultural runoff. They are not the operations receiving the waste at off-site fields anticipated in the permit, however. In what more closely resembles disposal operations, the permit allows the application of waste in quantities exceeding nutrient quantities that would be necessary to grow crops in consideration of the nutrients already present in the soil at the fields. Under these circumstances, where the application of nutrients is driven by the CAFO's need to dispose of its waste instead of being driven by a crop's need for nutrients, and regulated for those reasons, it is improper to treat the field as a non-point source exempt from a new source determination. The entire basis for the TMDL and the effort to reduce loadings depends upon regulation of the "disposal-type" operations through permits.

Finally, the Commission should reject arguments of the ED and Applicant that any future facility expansion to include a new off-site application field controlled by the Applicant is exempt from the new source determination and from permit amendment requirements. This is simply not the law. Any field located at a site at which no other source is located is, by law, a new source.⁵ Again, this is an important issue for purposes of the TMDL and TCEQ's efforts to eliminate the impairments in the watershed.

III. TRANSCRIPT COSTS

The amount proposed by Applicant for payment by Protestants includes two costs which clearly should not be assessed to the Protestants:

- (1) the costs of the preliminary hearing transcript; and
- (2) additional cost to expedite the transcript of the preliminary hearing.

These costs resulted from unilateral decisions by the Applicant. Neither cost is required. Both were simply made by Applicant for its own purposes.

⁵ 40 CFR 122.29(b)(i).

Protestants made no request for a transcript of the preliminary hearing and such a transcript is not customarily created in TCEQ hearings. It was prepared purely at the wish of the Applicant. Likewise, Protestants made no request for an expedited transcript. Again, an expedited transcript is not normally required and was not needed here. Protestants gained no benefit from the expedition of the transcript and did not even order a copy of the transcript.

IV. PRAYER

For the reasons stated above and in those set forth in Protestants' Exceptions, Protestants respectfully pray that the Commission deny Hidden View Dairy's Application for a permit amendment and assess all transcript costs to the Applicant. Protestants have proposed and filed findings of fact and conclusions of law in their final argument and that are attached to Protestants' Exceptions. They provide the basis for the denial.

Respectfully Submitted,

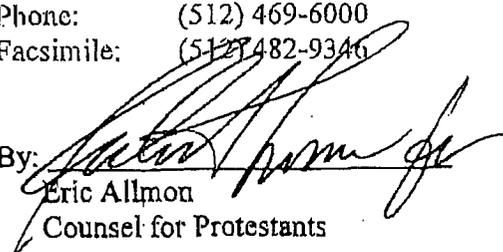
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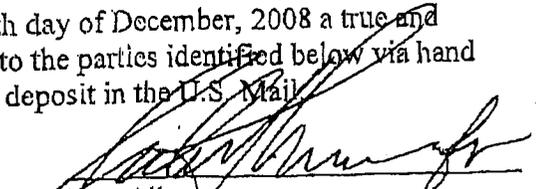
By: 

Eric Allmon

Counsel for Protestants

Certificate of Service

By my signature below, I hereby certify that on the 29th day of December, 2008 a true and correct copy of the foregoing document was delivered to the parties identified below via hand delivery, facsimile transmission, electronic mail, or by deposit in the U.S. Mail.


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Date: December 29, 2008

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DOCUMENTS	NUMBER OF PAGES (not including cover pg.)
Reply to Exceptions to the Proposal for Decision of Sierra Club and Dr. Pritchey Smith in TCEQ Docket No. 2007-0831-AGR, S000AH Docket No. 582-08-0007	8

COMMENTS:

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