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2008 DEC 15 PM 4: 21  
CHIEF CLERKS OFFICE

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

December 15, 2008

Via Facsimile and hand-delivery

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 **Exceptions of Sierra Club and Dr. Pritchey 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**

CHIEF CLERKS OFFICE

2008 DEC 15 PM 4:21

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**EXCEPTIONS OF SIERRA CLUB AND DR. PRITCHY SMITH**

**I. INTRODUCTION**

The application by Hidden View Dairy (Applicant) for an amendment to its concentrated animal feeding operation (CAFO) should be denied. Not all information necessary to evaluate the draft permit, and required to be submitted by federal law, has been provided or incorporated into the draft permit. The evidence establishes that off-site application fields authorized by the draft permit are properly considered parts of the CAFO, and thus "new sources," in addition to other facilities authorized by the draft permit. Yet, the impact of these new sources has not been considered in the permitting process. No demonstration has been made that the pollutant loadings resulting from issuance of the permit are consistent with the loadings allowed by the applicable total maximum daily load (TMDL). Furthermore, the anti-degradation analysis performed did not adequately address the contaminants involved, nor did the anti-degradation analysis performed use the proper baseline water quality values.

In addition, the proposal by the administrative law judge (ALJ) violates the requirements of the Texas Commission on Environmental Quality's (TCEQ) Rules because the ALJ has not recommended rulings on the findings of fact properly submitted by Protestants in this matter.

## II. BACKGROUND

Hidden View Dairy has applied to expand its CAFO from 2,000 to 3,000 head of cattle. This authorization will result in a consequent increase in manure production from 21,808 lb/day to 27,259 lb/day,<sup>1</sup> and an increase in phosphorus production from 377 lbs/day to 525 lb/day,<sup>2</sup> or what Applicant has described as an additional 50,000 pounds of slurry each week for delivery off-site.<sup>3</sup> The permit authorizes the land application of all of this additional material and nutrients within the watershed of the North Bosque River.<sup>4</sup>

The Application is subject to the total maximum daily load for soluble reactive phosphorus which has been developed for the North Bosque River.<sup>5</sup> Such a TMDL is a *quantitative* plan to determine the amount of a particular pollutant that the receiving water body can receive and still meet the applicable water quality standards.<sup>6</sup> The TMDL for the North Bosque River was necessitated due to the violation of water quality standards for nutrients and excessive algal growth.<sup>7</sup> This TMDL noted that dairy waste application fields contribute a disproportionately large share of nutrient loading in this watershed.<sup>8</sup> The development of the TMDL considered models of several different circumstances, but the only model that met the goals of the TMDL assumed that both the implementation of new management measures and the maintenance of conditions where the cow numbers, waste application fields areas, etc. would remain the same as existed in the mid-1990s.<sup>9</sup> This model anticipated that the total annual load of phosphorus at the

<sup>1</sup> Exh. P-5, p. 5. (Offer of Proof)(Protestants contest the ALJ's ruling of irrelevance).

<sup>2</sup> Exh. P-5, p. 7. (Offer of Proof)

<sup>3</sup> Tr. p. 73, l. 3-18.

<sup>4</sup> Ex. A-14, p. 15; Ex. P-3, p. 9, #18 (Offer of Proof)(Protestants contest the ALJ's ruling of irrelevance).

<sup>5</sup> Ex. ED-5, p. 10.

<sup>6</sup> Ex. A-33, p. 1.

<sup>7</sup> Ex. A-33, p. 2.

<sup>8</sup> Ex. A-33, p. 8.

<sup>9</sup> Ex. A-33, p. 11; Tr. p. 193, l. 11-21.

"Above Meridian" index station, which is the station most nearly downstream of Hidden View Dairy, would not exceed 10,479 lbs.<sup>10</sup>

The Executive Director has not determined the existing phosphorus load into Segment 1226, the remaining load which the stream can accept, or the phosphorus load that will be contributed by the proposed permit action. While TMDL for Segment 1226 has established a goal of decreasing the instream phosphorus loading by 50%, the ED also has not made any determination of whether the issuance of the permit under consideration will increase or decrease the concentration of phosphorus in Segment 1226.<sup>11</sup>

### **III. OBJECTIONS TO PROPOSAL FOR DECISION AND PROPOSED ORDER**

#### **A. The Administrative Law Judge Did Not Include Recommended Rulings on Protestants' Proposed Findings of Fact, in Violation of 30 TAC § 80.252(c).**

Protestants submitted proposed findings of fact to the administrative law judge (ALJ).<sup>12</sup> These were provided in response to the ALJ's request, in accordance with 30 TAC §80.252(c).<sup>13</sup> Under these circumstances, the ALJ's proposal for decision is required to include recommended rulings on the findings of fact so proposed by *any* party to the proceeding.<sup>14</sup> The ALJ's order includes no such rulings.

#### **B. The Draft Permit Authorizes a "New Source" or "New discharger".**

The term "new source" is defined in both federal and state regulations to include any facility that may discharge pollutants which commences construction after the initial

<sup>10</sup> Ex. A-33, p. 15.

<sup>11</sup> Ex. P-3, p. 10.

<sup>12</sup> Attachment A sets forth Protestants' Proposed Findings of Fact and Conclusions of law, as provided to the ALJ on October 17<sup>th</sup> with Protestants' Reply to Closing Arguments.

<sup>13</sup> Transcript of Hearing on the Merits, p. 376, l. 6 - 10.

<sup>14</sup> 30 TAC § 80.252(c).

proposal of performance standards for that source,<sup>15</sup> and a “new discharger” includes any facility that is not a new source, and has not previously received a permit for a discharge at that site, but from which there may be a discharge.<sup>16</sup> In considering land application fields, it is important to remember that the term “facility” includes any land associated with an activity subject to regulation under the National Pollution Discharge Elimination System (NPDES) program.<sup>17</sup> So, a field may itself be a “facility” even if no structure is built at the site. A determination of whether something is a “new source” or a “new discharger” is important, because under certain conditions the agency is prohibited from issuing a permit to a new source or a new discharger.<sup>18</sup>

1. Off-site Waste Application Fields Controlled by Hidden View Dairy.

If a waste application field is controlled by a CAFO, then a discharge from that waste application field is considered to be a discharge from the CAFO and therefore a “point source” discharge.<sup>19</sup> In this case, inadequate information is available regarding off-site application fields to determine whether they qualify as new sources, or merely as new dischargers, but the evidence does establish that many of these fields will be controlled by Hidden View Dairy, without any demonstration that any discharge has been previously authorized at those fields.

No real opportunity to examine the off-site application fields has been provided to either TCEQ or the public. The application form itself asks whether off-site fields are

<sup>15</sup> 40 CFR 122.2; 30 TAC § 305.2(23).

<sup>16</sup> 40 CFR § 122.2; 30 TAC § 305.2(22)

<sup>17</sup> 40 CFR § 122.23.

<sup>18</sup> 40 CFR § 122.4(l).

<sup>19</sup> 40 CFR § 122.23(b)(3); *Waterkeeper Alliance, Inc., et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 510 (“[I]n our view, regardless of whether or not runoff is collected at the land application area, itself, any discharge from a land area under the control of a CAFO is a point source discharge subject to regulation because it is a discharge from a CAFO.” (emphasis in original); Tr. p. 281, l. 3-6 (Testimony of Applicant’s expert Lial Tischler that land area under control of a CAFO is a point source).

owned, operated or controlled by Applicant, but Hidden View left this response blank.<sup>20</sup> The application form further requests land application agreements for off-site application fields not owned by Applicant, but these were not provided.<sup>21</sup> Hidden View has not disclosed the location of these fields, the size of the fields, the existing nutrient concentration of the fields, nor any other information related to the off-site application fields.<sup>22</sup> The Executive Director has not reviewed any information related to off-site application fields, and was not provided any information on those fields, nor does the ED know who will control the application rates on off-site fields.<sup>23</sup> Even Applicant's own experts did not examine the impact of the off-site application fields authorized by the draft permit.<sup>24</sup>

Despite the fact that only the Applicant knows where these off-site fields are located,<sup>25</sup> the evidence demonstrates that Hidden View Dairy will exercise control over many, if not all, of these off-site application fields. The Application states that Mr. DeJong, owner of Hidden View Dairy, will use another company which he also owns as the contract hauler to deliver waste to these fields.<sup>26</sup> When delivered, the equipment which he owns through this company may itself be used to apply the waste on these off-site fields.<sup>27</sup> By contract, he will restrict the quantity of nutrients applied to the fields,<sup>28</sup> he will require incorporation of the material,<sup>29</sup> and in coordination with a company he has

<sup>20</sup> Ex. A-28, p. APP-14, Tr. p. 45, l. 15-19.

<sup>21</sup> Ex. A-28, p. APP-14, Tr. p. 45, l. 25 - p. 46, l. 11.

<sup>22</sup> Tr. p. 47, l. 2-19.

<sup>23</sup> Tr. p. 222, l. 16 - 24; Tr. p. 263, l. 6 - 11; p. 237, l. 14 - 18; p. 239, l. 14 - 17.

<sup>24</sup> Tr. p. 285, l. 1 - 3.

<sup>25</sup> See Transcript at page 47, line 16, where Mr DeJong indicates that he knows but he's not telling.

<sup>26</sup> Ex. A-33. p. APP-0038-APP-0039; Tr. p. 64, l. 9 - 25.

<sup>27</sup> Tr. p. 62, l. 10-22.

<sup>28</sup> Ex. ED-4 p. 15-16; Ex. A-28, p. 130;

<sup>29</sup> Ex. ED-4 p. 15

hired he will be responsible for the collection and analysis of soil samples.<sup>30</sup> In fact, he testified that he may personally gather the soil samples at the off-site application fields, and it will be his consultants that will take information provided by the farmer to determine the appropriate application rates.<sup>31</sup> Additionally, Hidden View Dairy is responsible in an enforcement action for any violation occurring on an off-site field.<sup>32</sup>

The draft permit authorizes the application of waste from the dairy to these off-site application fields even if no prior authorization of any type has previously been issued for a discharge at that location.<sup>33</sup>

Based on what we don't know, the ALJ has recommended a conclusion that the off-site waste application fields will not be new sources or new dischargers. In effect, the ALJ has placed the burden on the Protestants to demonstrate that a particular field will constitute a new source or new discharger while also allowing the Applicant to refuse to disclose the identity of any off-site waste application fields. Of course, this places an impossible burden on the Protestants, and allows the Applicant to play a shell game where the information needed to evaluate the authorization is not available until after issuance of the authorization.

The ALJ has relied on the position taken by OPIC that allows the Applicant to hide this information. OPIC's brief closing arguments more nearly reflect a general restatement of the Executive Director's position on the issues involved prior to the 2004 rulemaking, than any serious consideration of the facts and arguments made in this particular case. For example, OPIC's closing arguments make assertions that as a legal

<sup>30</sup> Tr. p. 50, l. 7 – p. 51, l. 10.

<sup>31</sup> Transcript, p. 50, l. 22 – p. 51, l. 10.

<sup>32</sup> 30 TAC Section 321.42(j): “[T]he permittee will be subject to enforcement action for violations of the land application requirements on any third-party field under contract.”

<sup>33</sup> Ex. A-14; 30 TAC §§ 321.33(j), 321.42(v);

matter are flatly wrong after the 2004 rules, such as its claim that the proposed permit is a “no discharge” permit, and OPIC filed no reply to the closing arguments of the other parties. Given OPIC’s charge to represent the general public, it is disappointing that OPIC has taken positions on this, and other questions, that severely undermine the public’s ability to meaningfully participate in CAFO permitting decisions.

2. Off-site Waste Application Fields Authorized by Draft Permit, but Not Controlled by Hidden View.

Protestants also maintain that even if the off-site fields are not controlled by Hidden View Dairy, they still constitute land associated with activities being regulated under the National Pollution Discharge Elimination System, and are thus “facilities” that may constitute point sources.<sup>34</sup> As the U.S. Fifth Circuit Court of Appeals has noted, where surface water runoff has been collected or channeled prior to reaching a waterbody, the resulting discharge is a point source discharge.<sup>35</sup> In this manner, a full evaluation of whether the off-site fields that will actually be used constitute new sources independent of their status as part of the CAFO depends on an evaluation of how runoff will be handled at those fields. Applicant’s denial of any information regarding off-site fields prevents such an analysis. It is clear, however, that the permit contains no restriction that would limit application of waste from the CAFO to off-site land areas that would employ measures to channel runoff.

3. New Discharges from Hidden View Dairy Equipment.

Moreover, the draft permit authorizes new discharges by equipment controlled by Hidden View Dairy through Mr. DeJong. By his representations during the permitting

<sup>34</sup> 40 CFR § 122.23; Adopted by reference at 30 TAC § 281.25(a)(1).

<sup>35</sup> *Sierra Club v. Abston Construction Co., Inc. et al.*, 620 F.2d 41, 44-45 (5<sup>th</sup> Cir., 1980).

process, it is clear that Mr. DeJong intends to use his own equipment to apply waste on at least some of the off-site application fields where waste is authorized to be applied under the terms of this permit. The permit does not limit such off-site fields to locations where this equipment has previously applied waste.

Waste spreading vehicles are themselves point sources when they apply manure or other waste from a CAFO's production facilities to fields from which the material flows into Waters of the United States.<sup>36</sup> The permit authorizes the discharge of contaminants contained in the CAFO waste into Waters in the State so long as the material is applied in compliance with the limitations contained in the permit. By authorizing Mr. DeJong to use his vehicles to apply waste on new off-site application fields, which fields have not previously been authorized to receive waste, the proposed permit is authorizing new sources.

### **C. The Draft Permit is Inconsistent with the TMDL for the North Bosque River Watershed.**

The Commission explicitly referred the question of whether the draft permit meets the requirements of 40 CFR § 122.4(i).<sup>37</sup> This regulation establishes both the requirement that a permit for a new source or a new discharger be consistent with any applicable total maximum daily load, and how that demonstration is to be made. This section requires that, *before the close of the public comment period*, the owner or operator of a new source must demonstrate that there are sufficient remaining pollutant load allocations to allow for the discharge, and the existing dischargers into the waterbody

<sup>36</sup> *Concerned Area Residents for the Environment et al. v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994). *Community Association for Restoration of the Environment (CARE) v. Sid Koopam Dairy, et al.*, 54 F.Spp. 2d 976, 980 (E.D. Washington, 1999).

<sup>37</sup> August 13, 2007 Interim Order of the Commission, at p. 3.

covered by the TMDL are subject to compliance schedules designed to bring the waterbody into compliance with applicable water quality standards. Federal law permits no alternative means of making this demonstration, nor does federal law allow a permitting authority to use creative mechanisms such as "adaptive management" to deny the public this right to examine an application.

In addition to the requirements of 40 CFR § 122.4(i), the Memorandum of Agreement (MOA) between the TCEQ and EPA requires that each Texas Pollution Discharge Elimination System (TPDES) permit, such as this one, must be consistent with any EPA approved TMDL.<sup>38</sup> EPA has never approved the rules in Chapter 321 as implementing the TMDL, nor has EPA approved the Implementation Plan relied on by the Executive Director. Consistency with the TMDL itself must be demonstrated to meet the requirement of the MOA.

The evaluation performed in this case has fragrantly disregarded the requirements of 40 CFR § 122.4(i). TCEQ staff have denied that the public should even be able to examine this question:

Q (Allmon): How can we look at any individual permit and determine whether it is consistent with the TMDL?

A (Koenig): Well, the TMDL itself does not spell out what should be in a permit. It's a high-level assessment of how much reduction is possible[.]

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<sup>38</sup> Memorandum of Agreement Between the Texas Natural Resource Conservation Commission and the U.S. Environmental Protection Agency, Region 6, Concerning the National Pollutant Discharge Elimination System, Sept. 14, 1998 (Ex. P-2, p. 23)(Offer of Proof. This document was denied admission into the evidentiary record by the ALJ based the ALJ's finding that it is irrelevant. Protestants contend that the document is relevant to consideration of the immediate permit's consistency with the applicable TMDL, and also contend that the document constitutes applicable law which need not be admitted into the evidentiary record in order to be considered.)

Q: Can someone take a look at the permit and what's existing out there and determine what the total loading would be after issuance of the permit? Is that even possible?

A: No, no, I don't think so.

\* \* \*

Q: So essentially its your position that you only look to the rules in determining whether a permit is in compliance with the TMDL?

A: It is agency policy that the TMDL is not a rule. It's not a permit. It's a plan, and that permits have to be consistent with the rules under which they're written. So it isn't just my opinion.<sup>39</sup>

In this way, TCEQ staff have claimed that a separate evaluation of the consistency of the permit with the TMDL, apart from judging compliance with the rules contained in Chapter 321, is not required, and there is no way for the public to see how the loading from a particular permit fits into the total load allowed by a TMDL as provided in 40 CFR § 122.4(i). It is important to remember that the rules themselves contain no limit on the number of CAFOs or animals allowed in the North Bosque watershed, or the quantity of phosphorus entering the watershed from these facilities. Without such a maximum, the rules cannot be considered an acceptable substitute for demonstrated compliance with the loading limits of the TMDL itself.

In this case, the relevant load assessed in the TMDL is the amount of soluble phosphorus entering the stream.<sup>40</sup> Yet, several fundamental pieces of information have not been provided that are necessary to conduct the examination required by 40 CFR §

<sup>39</sup> Tr. p. 211, l. 10 – p. 212, l. 16.

<sup>40</sup> Ex. A-33, p. 15.

122.4(i). The expected phosphorus load of the expanded facility has not been provided, or even calculated.<sup>41</sup> The loading from other sources has not been provided:

Q (Allmon): [W]hat is the cumulative loading from other sources in the Bosque River watershed that have already been permitted, loading of phosphorus into the watershed?

A (Koenig): Do you mean when we did the TMDL or now or —

Q: Now, with the permits that are existing.

A: Well, gosh, I don't have that number in front of me at this point.

\* \* \*

Q: So there's no number for an existing load that we can look and see what load is this dairy going to add to find what the cumulative loading in the watershed is going to be as a result of issuance of this permit?

A: Well, I guess not.<sup>42</sup>

Furthermore, compliance schedules for other facilities in the watershed have also not been provided. Without these pieces of information explicitly required by 40 CFR § 122.4(i), it is impossible to conclude that the requirements of 40 CFR § 122.4(i) have been met. Thus, TCEQ is prohibited from issuing the draft permit.

The approach adopted by the ALJ, based on the ED's evaluation, denies the public any real opportunity to examine whether any permit is consistent with the TMDL for the North Bosque River. In fact, even the ALJ conditions his conclusion on this issue by saying that the Draft Permit is "as consistent with the TMDLs as can feasibly be

<sup>41</sup> Tr. p. 291, 11-4.

<sup>42</sup> Tr. p. 208, l. 4 - p. 209, l. 14.

*determined* at the present time.”<sup>43</sup> Under federal law, the public is entitled to a quantified demonstration that the issuance of a particular permit will not result in an overloading of the receiving waters, not the vague hopes that implementation of required and voluntary practices across a watershed will someday improve water quality.

The TMDL for the North Bosque River does establish some quantitative limits on phosphorus loading in the North Bosque Watershed that may be used in determining consistency of a permit with the TMDL. Several scenarios were modeled in the TMDL, but the scenario described as “TMDL-e” was the scenario relied upon to develop the targets of the TMDL intended to achieve the water quality standards.<sup>44</sup> In Table 4 of the TMDL, the anticipated phosphorus loading amounts under this scenario are set forth.<sup>45</sup> The river index station most immediately downstream of Hidden View Dairy is the site labeled “Above Meridian,”<sup>46</sup> and the anticipated net average total-annual soluble phosphorus loading at that site upon TMDL implementation is 10,479 kg/year.<sup>47</sup> Without information to determine the phosphorus load above this index station that will result if the permit is issued, in combination with all other sources authorized above this point, it is impossible to find that the permit is consistent with the TMDL for the North Bosque River.

**D. Hidden View has Not Demonstrated that the Permit Complies with Applicable Water Quality Standards.**

**1. The Discharge Authorized by the Draft Permit Will Contribute to a Violation of the Dissolved Oxygen Standards in Green Creek.**

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<sup>43</sup> Proposal for Decision, at p. 17.

<sup>44</sup> Tr. p. 193, l. 11 – 21.

<sup>45</sup> Ex. A-33, p. 15.

<sup>46</sup> Tr. p. 198, l. 13 – 17.

<sup>47</sup> Ex. A-33, p. 15.

The draft permit proposes to authorize a discharge into Green Creek from the retention control structures, including nutrients held in that structure.<sup>48</sup> Nutrients can lead to a lowering of dissolved oxygen concentrations in receiving waters. The applicable water quality standard for Continuous Dissolved Oxygen Daily 24 hour average is 3.00 mg/l, and the applicable water quality standard for Continuous Dissolved Oxygen Daily 24 hour minimum is 2.00 mg/l.<sup>49</sup> Green Creek is impaired for these dissolved oxygen parameters, resulting an inability of the creek to fully support the designated aquatic life use.<sup>50</sup> In short, Green Creek is impaired for Daily Average and Daily Minimum dissolved oxygen water quality standards. No TMDL has been developed for dissolved oxygen in Green Creek, however.<sup>51</sup>

TCEQ may not issue a permit to a new source if a discharge from its construction or operation will cause or contribute to the violation of water quality standards.<sup>52</sup> Furthermore, without regard to whether a permitting decision involves a new source, no permit may be issued when the conditions of the permit do not provide for compliance with regulations promulgated under the Clean Water Act, such as the state water quality standards.<sup>53</sup> Also, no permit may be issued where the imposition of conditions cannot ensure compliance with the applicable water quality requirements, such as water quality standards.<sup>54</sup>

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<sup>48</sup> Ex. ED-4, p. 2. (The referenced 40 CFR § 412(a)(1)(i) authorizes a discharge during a precipitation event.)

<sup>49</sup> Ex. A-51, p. 6.

<sup>50</sup> Ex. A-51, p. 6.

<sup>51</sup> Tr. p. 214, l. 1-4.

<sup>52</sup> 40 CFR 122.4(i); incorporated to TCEQ regulations at 30 TAC § 305.538.

<sup>53</sup> 40 CFR 122.4(a); incorporated to TCEQ regulations at 30 TAC § 305.538.

<sup>54</sup> 40 CFR 122.4(d); incorporated to TCEQ regulations at 30 TAC § 305.538.

No TMDL has been developed to address the dissolved oxygen impairment in Green Creek.<sup>55</sup> The draft permit will add nutrients to Green Creek through both runoff from waste application fields, and discharges from the retention control structures at the facility.<sup>56</sup> Applicant has not demonstrated that these nutrients will not contribute to low dissolved oxygen levels in Green Creek. Higher nutrient levels lead to increased growth of algae and other aquatic plants.<sup>57</sup> Higher levels of plant growth result in the lowering of dissolved oxygen concentrations. Thus, issuance of the permit would violate 40 CFR 122.4(i). Without a TMDL, there is no way to assure that the provisions of the permit provide for compliance with the dissolved oxygen limitations in Green Creek, so that issuance of the permit would violate 40 CFR 122.4(a). Additionally, the authorization of any discharge of oxygen demanding materials into Green Creek undermines assurance that Green Creek will meet the dissolved oxygen water quality standards, so that issuance of the permit would violate 40 CFR 122.4(d).

2. Insufficient Information Regarding the Applicable Effluent Limitations has been Provided, and Included in the Permit, to Demonstrate Compliance with Applicable Water Quality Standards.

Evaluating compliance of the draft permit with the applicable water quality standards requires a review of the effluent limitations contained in the permit, but this has not been possible in this case.

Federal law requires that a copy of each permit application and each permit be available to the public during the permitting process,<sup>58</sup> with the opportunity for a hearing

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<sup>55</sup> Tr. P. 304, l. 16-18.

<sup>56</sup> See Tr. p. 286, l. 1-4. Ex. A-51, p. 8 ("Waste Application Fields occupy a relatively small area of the watershed, but contribute a disproportionately large share of the nutrient loading"). Tr. p. 312, l. 6-17., p. 313, l. 13-19.

<sup>57</sup> Ex. A-33, p. 2 (last paragraph).

<sup>58</sup> 33 U.S.C. Section 1342(j); *Waterkeeper Alliance, Inc., et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 498 - 504 (2d Cir., 2005).

on any NPDES permit.<sup>59</sup> The permitting authority is required to review this information prior to issuance of a permit.<sup>60</sup> Every permit issued under authority granted by the Clean Water Act is required to set forth the effluent limitations applicable to a facility.<sup>61</sup> Normally, a water quality permit would include effluent limitations in the form of specific numeric criteria limiting the contaminants in a discharge, such as a specific mg/l total phosphorus limitation in a domestic wastewater discharge. This is not the approach that has been adopted for CAFOs.

### 3. The Terms of The Nutrient Management Plan Have Not Been Included in the Permit.

CAFOs are required to take certain actions, or “management practices” as a substitute for effluent limitations. These practices are embodied in the nutrient management plan. Since nutrient management plans legally constitute effluent limitations, and are an enforceable portion of the NPDES permit, they are required to be available to the public during the permitting process, and the terms of those plans are required to be set forth in the permit itself.<sup>62</sup> The nutrient management plan required by the permit has not been provided in this case,<sup>63</sup> and so it is not possible for the public to meaningfully evaluate the permit. Without providing a complete copy of this plan, and incorporating the terms of the plan into the permit itself, Applicant has not met its burden of proof to demonstrate that the draft permit is in compliance with applicable water quality standards.

<sup>59</sup> 330 U.S.C Section 1342(a); *Waterkeeper Alliance, Inc., et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 498 – 504 (2d Cir., 2005).

<sup>60</sup> 33 U.S.C. Section 1342(a)(1). *Waterkeeper Alliance, Inc., et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 498 – 504 (2d Cir., 2005).

<sup>61</sup> *Waterkeeper Alliance, Inc., et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 490 (2d Cir., 2005).

<sup>62</sup> *Waterkeeper Alliance, Inc., et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 502-503 (2d Cir., 2005).

<sup>63</sup> Ex. P-3, p. 9 (Offer of Proof).

4. The Retention Control Structure Management Plan, an Element of the Nutrient Management Plan, has Not Been Available to the Public Or Set Forth in the Permit.

In this case, the failure to provide the Retention Control Structure (RCS) management plan is the most obvious example of Applicant's failure to provide a copy of the nutrient management plan, and incorporate that plan into the permit.

The fundamental regulatory elements of a nutrient management plan are contained in federal regulations which have been incorporated into TCEQ regulations.<sup>64</sup> One element of the federally mandated nutrient management plan is a plan to "ensure adequate storage of manure, litter, and process generated wastewater, including procedures to ensure proper operation and maintenance of the storage facilities."<sup>65</sup> The RCS management plan serves this purpose for Hidden View Dairy. Yet, no party disputes that the RCS management plan has not been provided.<sup>66</sup>

Hidden View Dairy owner, William DeJong testified that the permit requires an RCS management plan be implemented<sup>67</sup> but has not been provided to the TCEQ because the lagoon has not been built.<sup>68</sup> The engineering plans for the lagoon exist and the intended capacity of the structure is known.<sup>69</sup> Plans or designs for a new facility of any kind presented during the permitting process always involve elements of the facility that have not yet been constructed, but this is no valid reason to claim that no plan can be developed. The situation here is as if a landfill operator took the position that no site operating plan (SOP) could be developed until the landfill had been excavated. Such a

<sup>64</sup> 40 CFR Section 122.42(e); incorporated at 30 TAC Section 305.531(2).

<sup>65</sup> 40 CFR § 122.42(e)(1)(i).

<sup>66</sup> 40 CFR Section 122.42(e); incorporated at 30 TAC Section 305.531(2).

<sup>67</sup> Transcript, P 73, li. 19-25

<sup>68</sup> Transcript, P 74, li. 13-17

<sup>69</sup> Transcript, P 75, li. 9-24

position is unacceptable to TCEQ when permitting landfills, since the excavation has already been designed (just as in this case); and applicant's position makes no more sense here.

It is a violation of the Clean Water Act for TCEQ to issue a permit to a CAFO without reviewing these retention control structure management plans, and without allowing the public to review this plan.<sup>70</sup> Since without this plan it is impossible to fully evaluate the nature of the authorized discharges from the retention control structures, Applicant's refusal to provide this plan prevents them from demonstrating that their permit application will not result in a violation of state water quality standards.

5. The Comprehensive Nutrient Management Plan is an Effluent Limitation in the Permit, and Must be Available to the Public in its Entirety and Set Forth in the Permit.

In issuing a TPDES permit to Hidden View Dairy, TCEQ has required not just a nutrient management plan, but the development of a certified Comprehensive Nutrient Management Plan ("CNMP") which the facility will adhere to.<sup>71</sup> In implementing this requirement, TCEQ has only required that the CAFO have such a plan, but no review is performed of the plan itself by the TCEQ.<sup>72</sup> Additionally, the permit does not contain the plan.<sup>73</sup>

It is not adequate to merely require a permittee to develop such a plan. Since the comprehensive nutrient management plan is serving the role of an effluent limitation in this case, the full comprehensive nutrient management plan is required to be provided during the public comment period, and is required to be included in the permit itself.

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<sup>70</sup> 33 U.S.C. Section 1342(a)(1). *Waterkeeper Alliance, Inc., et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 498 – 504 (U.S.App. 2d Cir., 2005).

<sup>71</sup> Exhibit ED-4, p. 13

<sup>72</sup> Tr. p. 240, l. 17 – 20.

<sup>73</sup> Tr. p. 240, l. 10 – 16.

This has not been done. The ALJ asserts that the CNMP was provided to Protestants during discovery, but this is not true. The material contained in Applicant's Exhibit 28 is the full extent of the material provided during the discovery phase of this proceeding. As confirmed by Applicant's own witness on the stand, contrary to the claims by Applicant's counsel during the discovery phase of the hearing, this is only a portion of the plan.<sup>74</sup>

Beyond a violation of federal requirements as incorporated into state law, the failure to make the plan available is a violation of 30 TAC Section 80.118(a)(1), which requires that the record in any hearing include a copy of the final draft permit.

The unavailability of the complete plans serving as effluent limitations in this case raise fundamental public participation questions. The Clean Water Act explicitly provides:

[P]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.<sup>75</sup>

The complete nutrient management plan required by the draft permit in this case constitutes an effluent limitation, and yet TCEQ is not just failing to assist the public in participating in the development of this plan, it is impeding the public's ability to do so. When considering the positions of the parties in this case, OPIC's total silence on this issue is troubling.

This is not only a permitting issue - the public is *entitled* to enforce any federally-enforceable effluent limitation through a citizen suit, so the public will be entitled to

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<sup>74</sup> Tr., p. 174, l. 2 - p. 175, l. 12.

<sup>75</sup> 33 U.S.C. Section 1251(e).

pursue enforcement of these comprehensive nutrient management plans.<sup>76</sup> TCEQ's refusal to require public access to any plan required by a TPDES permit is frustrating this right of the public.

#### **F. A Sufficient Anti-Degradation Analysis Has Not Been Performed**

##### 1. It has not been demonstrated that the discharge will not result in an increase in pollution.

The anti-degradation policy applies to any permitting action that would increase pollution of water in the state.<sup>77</sup> The ALJ's conclusion that the proposed expansion will not result in such an increase, and so is unjustified. This determination cannot be made without considering the impacts of discharges from off-site waste application fields, which are authorized by this draft permit but have not been considered in the determination of whether the permit will result in an increase in pollution. Additionally, this determination requires comparing the pollution from the proposed authorization to the proper baseline, and a proper baseline water quality has not been used in this case.

##### 2. The Proper Baseline Water Quality has Not Been Determined

The proper baseline is the highest water quality sustained since November 28, 1975.<sup>78</sup> Where information has been presented to indicate that the quality of the receiving water has been degraded since November 28, 1975, then the required baseline is November 28<sup>th</sup>, 1975.<sup>79</sup> The record contains substantial information indicating that the water quality of Green Creek, and Segment 1226 of the North Bosque River have been degraded since November of 1975. The TMDL for the North Bosque River notes the

<sup>76</sup> 33 U.S.C. Section 1365(a). *Waterkeeper Alliance, Inc., et al. v. United States Environmental Protection Agency*, 399 F.3d 486, 503 (U.S.App. 2d Cir., 2005).

<sup>77</sup> 30 TAC § 307.5(a)

<sup>78</sup> 30 TAC § 307.5(c)(2)(B).

<sup>79</sup> Ex. A-52, p. 31.

deteriorating water quality conditions in that water body during the 1990s.<sup>80</sup> Parc Smith has testified regarding the degradation of water quality observed in Green Creek.<sup>81</sup> Furthermore, Green Creek has been relatively recently recognized as impaired for dissolved oxygen parameters,<sup>82</sup> and Segment 1226 of the North Bosque River was first recognized as impaired for nutrients and aquatic plant growth during the 1990s.<sup>83</sup> The record contains no basis from which TCEQ can make the necessary determination of the highest water quality sustained since November 28, 1975. Since knowledge of the baseline water quality is necessary for a determination of both whether a facility will increase pollution of the receiving waters, and determining whether the receiving waters exceed fishable/swimmable quality for purposes of the anti-degradation analysis, the ALJ's conclusions on these issues lack sufficient foundation.

### 3. A Proper Anti-Degradation Analysis for Bacteria Has Not Been Performed.

The ALJ states that a Tier 2 review, to determine whether water quality will be degraded by more than a de minimis amount, was not required because the receiving waters do not exceed fishable/swimmable water quality. TCEQ rules describe the circumstances where a Tier 2 review is required:

No activities subject to regulatory action **which would cause degradation of waters which exceed fishable/swimmable quality** will be allowed unless it can be shown to the commission's satisfaction that the lowering of water quality is necessary for important economic or social development.<sup>84</sup>

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<sup>80</sup> Ex. A-33.

<sup>81</sup> Ex. P-1.

<sup>82</sup> Ex. A-51, p. 6.

<sup>83</sup> Ex. A-33, pp. 6-7.

<sup>84</sup> 30 TAC § 307.5(b)(2).

Thus, the nature of a receiving water as fishable/swimmable under baseline conditions is important.

Applicant's own witness confirmed that Green Creek is fishable/swimmable.<sup>85</sup> Contact recreation and high quality aquatic life are designated use for the North Bosque River,<sup>86</sup> and the 2008 Texas Water Quality Inventory indicates that the North Bosque River supports fishable/swimmable uses.<sup>87</sup> Thus, a Tier 2 anti-degradation analysis is required for Green Creek and the North Bosque River.

The ED has relied upon the existence of a TMDL for the North Bosque River to excuse the agency from performing a Tier 2 anti-degradation analysis. Lori Hamilton was not available for cross-examination, but her anti-degradation analysis on behalf of TCEQ is presented in Exhibit ED-11. This memorandum concludes that the permit is consistent with the requirements of the anti-degradation implementation procedures based on a reliance on the TMDL pursuant to 30 TAC § 307.5(c)(2)(G).<sup>88</sup>

The anti-degradation analysis can only be avoided based on the existence of a TMDL with regard to the *specific parameters* that are addressed by the TMDL.<sup>89</sup> The TMDL referenced by Mrs. Hamilton for the North Bosque River does not address bacteria.<sup>90</sup> Instead, the TMDL notes:

These total maximum daily load allocations were developed to address nutrient loading and algal growth, and to support plans for attaining and maintaining water quality standards in the North Bosque River.<sup>91</sup>

In fact, bacteria is not even mentioned in this TMDL.

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<sup>85</sup> Tr. p. 303, l. 17 - 19.

<sup>86</sup> 30 TAC § 307.10, Appendix A.

<sup>87</sup> Ex. A-51.

<sup>88</sup> Ex. ED-11, p. 2.

<sup>89</sup> 30 TAC § 307.5(c)(2)(G).

<sup>90</sup> Ex. A-33.

<sup>91</sup> Ex. A-33, p. 4.

At the least, the draft permit authorizes the discharge of bacteria from the retention control structures:

Q (Allmon): [W]ould the water -- the wastewater and sludge contained in the retention control structures contain pathogens?

A (Tischler): They will definitely contain bacteria. . . . Certainly it will contain bacteria in the indicator bacteria that we use for controlling the bacteria in the streams.

Q: So what type of bacteria are those?

A: The indicator bacteria that historically were used for many years are what are called fecal coliform bacteria.

\* \* \*

Q: Okay. If a discharge were to occur from a retention control structure, would those pathogens be released into Green Creek -- and bacteria?

A: If there's a discharge from a retention control structure, then the bacteria that are contained in the water that's captured would be released to the creek.<sup>92</sup>

One of these retention control structures is being enlarged as a result of this expansion,<sup>93</sup> and the permit authorizes the discharge of the contents of this control structure during certain rainfall events without a limit on the quantity of the discharge, which increases the potential amount of bacteria-containing wastewater that may be discharged from that structure.

**G. The Proposed Permit Does Not Include Adequate Requirements for the Control of Pathogens.**

The EPA has not issued "best conventional pollutant control technology" (BCT) guidelines for CAFOs. Where the EPA has not yet issued BCT guidelines for a pollutant

<sup>92</sup> Tr. p. 312, l. 7 - p. 313, l. 19.

<sup>93</sup> Ex. ED-5, p. 3.

from a type of source, the permitting authority must require technology-based limitations on a case-by-case basis, in consideration of specific factors set forth at 40 CFR Section 125.3(d)(2). This requirement has been incorporated into TCEQ rules by reference.<sup>94</sup> Bacteria and pathogens are included in the discharge from CAFOs. Yet, TCEQ has not performed a case-by-case evaluation of BCT requirements for pathogens,<sup>95</sup> and Hidden View Dairy has provided no case-by-case analysis for pathogens.<sup>96</sup> Without a specific analysis of the control technology contained in the permit for pathogens, the required demonstration that the facility will employ the best conventional control technology for this contaminant has not been made.

#### IV. PRAYER

For the reasons stated above, Protestants respectfully pray that the Commission deny Hidden View Dairy's Application for a permit amendment, and that the Commission adopt Protestant's attached findings of fact and conclusions of law.

Respectfully Submitted,

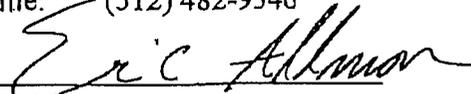
**LOWERRE, FREDERICK, PERALES,  
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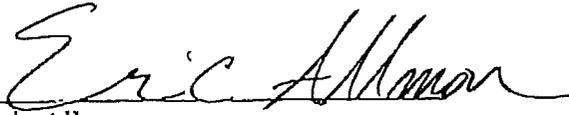
<sup>94</sup> 30 TAC Section 308.1 incorporates Subpart A of Part 125, including 125.3; Also, compliance with 40 CFR 125.3 is required by 40 CFR 122.44. TCEQ rules incorporate 40 CFR 122.44 by reference at 30 TAC 305.531(4). Thus, a violation of the requirements of 40 CFR 125.3 is a violation of TCEQ rules.

<sup>95</sup> Tr. p. 224, l. 25 – p. 225, l. 4.

<sup>96</sup> Tr. p. 225, l. 10 – 14.

**Certificate of Service**

By my signature below, I hereby certify that on the 15th day of December, 2008 an original and seven copies of the foregoing document was served upon the TCEQ Chief Clerk, and true and correct copies to the parties identified below via hand delivery, facsimile transmission, electronic mail, or by deposit in the U.S. Mail.

  
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P. 27

# ATTACHMENT A

**SOAH DOCKET 582-08-0007  
TCEQ DOCKET 2007-0831-AGR**

**Application to Amend Permit WQ0003197000  
Protestants' Proposed Findings of Fact and Conclusions of Law**

**I. New Source or New Discharger Determination**

**A. Findings of Fact**

- (1) Hidden View Dairy is a concentrated animal feeding operation (CAFO).<sup>1</sup>
- (2) Green Creek is a creek which flows through Hidden View Dairy.
- (3) Hidden View Dairy is located in the watershed of Segment 1226 of the North Bosque River.<sup>2</sup>
- (4) Manure includes slurry.<sup>3</sup>
- (5) The draft permit authorizes the application of manure or process-generated wastewater to off-site application fields in accordance with the requirements of 30 TAC §§ 321.36 and 321.40.<sup>4</sup>
- (6) The draft permit authorizes the application of manure or process-generated wastewater to off-site application fields located in areas where no other source was previously located.<sup>5</sup>
- (7) The draft permit authorizes the application of manure or process-generated wastewater to off-site application fields which have never received a finally effective National Pollutant Discharge Elimination System permit for discharges at those fields.<sup>6</sup>

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<sup>1</sup> Tr. p. 236, l. 1-2.

<sup>2</sup> Ex. ED-5, p. 3.

<sup>3</sup> ED. Ex. 4, p. 32.

<sup>4</sup> Ex. ED-4, p. 15.

<sup>5</sup> Ex. ED-4;

<sup>6</sup> *Id.*

- (8) The draft permit limits manure, sludge, and wastewater application rates on off-site fields in consideration of the crop nitrogen requirement, Phosphorus crop removal rate, and concentration of phosphorus in the soil.<sup>7</sup>
- (9) Hidden View Dairy is responsible with ensuring that the application of manure, sludge, and/or wastewater to off-site application fields under contract with Hidden View Dairy complies with the applicable land application requirements of TPDES Permit No. WQ0003197000.<sup>8</sup>
- (10) Hidden View Dairy is a Texas General Partnership.<sup>9</sup>
- (11) William N. DeJong is a general partner, and co-owner, of Hidden View Dairy.<sup>10</sup>
- (12) DJ Agriservice will serve as the contract waste hauler to remove waste from Hidden View Dairy.<sup>11</sup>
- (13) DJ Agriservice holds a contract to serve as the waste hauler for the duration of the permit.<sup>12</sup>
- (14) DJ Agriservice delivers waste, including slurry, from Hidden View Dairy to off-site locations, including off-site application fields.<sup>13</sup>
- (15) If off-site application fields are used, DJ Agriservice may deliver some of the additional manure that the new cows will generate to off-site application fields.<sup>14</sup>
- (16) If off-site application fields are used, DJ Agriservice may transport waste from Hidden View Dairy in containers to off-site waste application fields.

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<sup>7</sup> Ex. ED-4, p. 16.

<sup>8</sup> Ex. ED-4, p. 17.

<sup>9</sup> Ex. A-28, p. APP-0009.

<sup>10</sup> Ex. A-28, p. APP-0009; Tr. p. 42, l. 17-18.

<sup>11</sup> Ex. A-28, p. APP-0038; Tr. p. 61, l. 11-17.

<sup>12</sup> Ex. A-28, p. APP-0038; Tr. p. 63, l. 2-6.

<sup>13</sup> Tr. p. 62, l. 12-22.

<sup>14</sup> Tr. p. 64, l. 17-21.

- (17) On some occasions, DJ Agriservice will use its equipment to apply the additional manure that the new cows will generate to third-party fields.<sup>15</sup>
- (18) Equipment owned by DJ Agriservice will apply waste from Hidden View Dairy to off-site fields.<sup>16</sup>
- (19) DJ Agriservice is a Limited Liability Company owned by the DeJong family.<sup>17</sup>
- (20) Construction will be required for the installation of the expanded Retention Control Structure (RCS) # 2.
- (21) Construction of the expanded RCS # 2 authorized by the draft permit will require the disturbance of approximately 2 acres and excavation to a depth of 12-15 feet.<sup>18</sup>

## **B. Conclusions of Law**

### Off-Site fields as part of CAFO

- (1) A Concentrated animal feeding operation (CAFO) is a "point source." 33 U.S.C. § 1362(14); TEX. WATER CODE § 26.001(21); 30 TAC § 307.3(40).
- (2) A "New source" is any building structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced after proposal of standards of performance in accordance with Clean Water Act, § 306, which are applicable to such source. 40 CFR § 122.2; 30 TAC § 305.2(23).
- (3) Standards of performance applicable to CAFOs such as Hidden View Dairy were proposed on February 14, 1974. 40 CFR 412.15; 39 Fed. Reg. 5706 (February 14, 1974).

<sup>15</sup> Tr. p. 64, l. 19-25.

<sup>16</sup> Tr. p. 62, l. 19-22.

<sup>17</sup> Tr. p. 61, l. 25 - p. 62, l. 5.

<sup>18</sup> Ex. A-28, p. APP-0019

- (4) A "facility" includes any land or appurtenances to a point source that is subject to regulation under the NPDES program. 40 CFR § 122.2.
- (5) The discharge of manure, litter or process-generated wastewater, including slurry, to the Waters of the United States from a CAFO as a result of the application of that material to land areas under the control of the CAFO is a discharge from that CAFO, except where it is an agricultural stormwater discharge. 40 CFR § 122.23(e).
- (6) The draft permit authorizes the discharge of manure, litter or process-generated wastewater into Segment 1226 of the North Bosque River, including Green Creek, from off-site application fields if the manure, litter, or process-generated wastewater has been applied in accordance with the land application requirements of the permit. 30 TAC §§ 321.36 and 321.40; Ex. ED-4 (Draft Permit) at p. 2.
- (7) As a general partner of Hidden View Dairy, William N. DeJong may exercise control over Hidden View Dairy and act as its agent. TEX. BUS. ORG. CODE §§ 152.203, 152.301, 152.302.
- (8) William N. DeJong is able to exercise control over DJ Agriservice, and its activities.<sup>19</sup>
- (9) Considering Hidden View Dairy's contractual control over the quantity and methods of nutrient application on off-site application fields authorized by the draft permit, Mr. DeJong's ability to control the equipment which will deliver and apply waste (including slurry) to the off-site application fields authorized by the draft permit, and Mr. DeJong's status as a general partner and legal agent of Hidden View Dairy, the off-site application fields authorized by the draft permit to be operated in this manner are controlled by Hidden View Dairy.

<sup>19</sup> Ex. A-28, p. APP-0038; Tr. p. 61, l. 25 - p. 62, l. 5.

- (10) A discharge from those off-site application fields controlled by Hidden View Dairy constitutes a discharge from Hidden View Dairy.
- (11) The discharge of contaminants from off-site application fields authorized by the permit are subject to regulation under the National Pollutant Discharge Elimination System. 30 TAC §§ 321.36 and 321.40; Memorandum of Agreement between Texas Natural Resource Conservation Commission and the U.S. Environmental Protection Agency, Region 6, Concerning the National Pollution Discharge Elimination System, p. 1-2.
- (12) The off-site application fields authorized by the draft permit are facilities from which there is or may be a discharge of pollutants. The construction and operation of those fields will commence after the proposal of standards of performance in accordance with Clean Water Act, § 306. As such, the off-site application fields authorized by the draft permit are new sources.

#### Equipment

- (13) The term "point source" means any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture. 33 U.S.C. § 1362(14); TEX. WATER CODE § 26.001(21); 30 TAC § 307.3(40).
- (14) A vehicle controlled by a CAFO used for the application of manure, litter, or process-generated wastewater from a CAFO is a point source.

- (15) The draft permit authorizes the discharge of contaminants from vehicles owned and controlled by Hidden View Dairy at locations where such discharges have not been previously authorized.
- (16) The draft permit authorizes the discharge of contaminants from off-site application fields where waste has been applied in conformance with the terms of the permit and the requirements of applicable rules.
- (17) The draft permit's authorization of the application of manure, litter, or process-generated wastewater by equipment owned and controlled by Hidden View Dairy on off-site application fields where no source currently exists constitutes the authorization of a new source.

#### Retention Control Structure

- (18) The draft permit authorizes the discharge of wastewater into Greens Creek from RCS # 2 during a chronic or catastrophic rainfall event if the RCS is properly designed, constructed, operated and maintained under the terms of the draft permit. Draft Permit at p. 4.
- (19) RCS # 2 is a facility from which there is or may be a discharge of pollutants, the construction of which will commence after proposal of standards of performance for CAFOs, and so it is a "new source."

## II. Requirements of 40 CFR § 122.4(i)

### A. Findings of Fact

- (22) Segment 1226 of the North Bosque River does not meet applicable narrative water quality standards related to nutrients and aquatic plant growth.<sup>20</sup>
- (23) Manure in slurry form applied to off-site application fields will contain nutrients.
- (24) The draft permit authorizes the discharge of nutrients contained in the slurry into the watershed of Segment 1226 of the North Bosque River if the slurry has been applied in conformance with the terms and conditions of the permit.
- (25) The draft permit authorizes new sources of nutrients, including phosphorus, into Green Creek and Segment 1226 of the North Bosque River.
- (26) Texas has performed a pollutant load allocation for the discharge of phosphorus into Segment 1226 of the North Bosque River, which modeled different scenarios. This is the Two Total Maximum Daily Loads for Phosphorus in the North Bosque River (TMDL).<sup>21</sup>
- (27) The TMDL allocations were developed to address nutrient loading and algal growth, and to support plans for attaining and maintaining water quality standards in the North Bosque River.<sup>22</sup>
- (28) As an endpoint, the TMDL estimated that a 50% reduction in loading was needed to attain a 50% reduction in the average concentration in the vicinity of Meridian.<sup>23</sup>
- (29) The TMDL-e scenario modeled in the TMDL for Segment 1226 is the only scenario that demonstrated achievement of the endpoint of the TMDL.<sup>24</sup>
- (30) "Above Meridian" is the index point nearest downstream from Hidden View Dairy.<sup>25</sup>

<sup>20</sup> Ex. A-33, p. 2.

<sup>21</sup> Ex. A-33.

<sup>22</sup> Ex. A-33, p. 4.

<sup>23</sup> Ex. A-33, p. 5.

<sup>24</sup> TR. p. 193, l. 11 - 21.

- (31) The predicted net average total-annual soluble phosphorus loading at Above Meridian under the TMDL-e scenario is 10,479 kg/yr.<sup>26</sup>
- (32) The phosphorus load into Segment 1226 of the North Bosque River resulting from issuance of the draft permit has not been determined.<sup>27</sup>
- (33) The cumulative phosphorus loading of other dischargers into Segment 1226 of the North Bosque River has not been determined.<sup>28</sup>
- (34) The phosphorus load into the North Bosque River if the draft permit is issued has not been determined.<sup>29</sup>
- (35) No demonstration has been made of the remaining pollutant load allocations in Segment 1226 of the North Bosque River.
- (36) Hidden View Dairy has not demonstrated the phosphorus load that is contributed to Segment 1226 of the North Bosque River by existing dischargers into that segment.
- (37) Hidden View Dairy has not identified all existing dischargers into Segment 1226 of the North Bosque River.
- (38) Hidden View Dairy has not demonstrated the existence of compliance schedules applicable to all existing dischargers into Segment 1226 of the North Bosque River.
- (39) Hidden View Dairy has not demonstrated that existing dischargers into Segment 1226 of the North Bosque River are subject to compliance schedules designed to bring the

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<sup>25</sup> Tr. p. 198, l. 13 - 17.

<sup>26</sup> Ex. A-33, p. 15.

<sup>27</sup> Tr. p. 290, l. 10 - 15; Tr. p. 291, l. 1 - 4.

<sup>28</sup> Tr. p. 208, l. 5 - 12; p. 211, l. 24 - p. 212, l. 3.

<sup>29</sup> Tr. p. 209, l. 9 - 14.

segment into compliance with narrative water quality standards related to nutrients and aquatic plant growth applicable to Segment 1226 of the North Bosque River.

### **B. Conclusions of Law**

- (20) 40 CFR § 122.4(i) prohibits the issuance of a permit to a new source or new discharger if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.
- (21) 40 CFR § 122.4(i) has been incorporated by reference into Title 30 of the Texas Administrative Code at 30 TAC § 305.538.
- (22) The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards and for which the State has performed a pollutant load allocation for the pollutant to be discharged must demonstrate that:
- (i) There are sufficient remaining pollutant load allocations to allow for the discharge; and
  - (ii) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. 40 CFR § 122.4(i)
- (23) Hidden View Dairy has not demonstrated that sufficient phosphorus allocations remain in Segment 1226 of the North Bosque River to allow for the discharges authorized by the draft permit, so the permit should be denied.
- (24) Hidden View Dairy has not demonstrated that existing dischargers in Segment 1226 of the North Bosque River are subject to compliance schedules designed to bring the

segment into compliance with applicable water quality standards, so the permit should be denied.

### III. TMDL for the North Bosque River Watershed

#### A. Findings of Fact

- (40) The TMDL-e scenario modeled in the TMDL for Segment 1226 is the only scenario that demonstrated achievement of the endpoint of the TMDL.<sup>30</sup>
- (41) The TMDL-e scenario assumed the populations, wastewater treatment plant flows, dairy cow numbers, and waste application field areas corresponding to the mid-1990s monitoring period.
- (42) The draft permit authorizes additional dairy cows in the watershed of Segment 1226, without a demonstration that this change will not result in more cows in the watershed than was modeled in the TMDL-e scenario.
- (43) The draft permit authorizes the location of additional off-site application fields within the watershed of Segment 1226, without a demonstration that this change will not result in more waste application field acreage than was modeled in the TMDL-e scenario.

#### B. Conclusions of Law

- (25) The TMDL-e scenario establishes the actions needed to implement the TMDL. If a permit is inconsistent with the assumptions of the TMDL-e scenario, it is inconsistent with the TMDL.
- (26) The draft permit is inconsistent with the assumptions of the TMDL-e scenario with regard to both the number of dairy cows in the watershed, and the quantity of waste

<sup>30</sup> TR. p. 193, l. 11 - 21.

application field area in the watershed. Therefore, the draft permit is inconsistent with the TMDL, and should be denied.

#### IV. Water Quality Standards

##### A. Findings of Fact

- (44) Green Creek does not meet State water quality standards for Daily Average and Daily Minimum dissolved oxygen water quality standards.
- (45) Texas has not performed a pollutant load allocation for nutrients and other contaminants contributing to the impairment of Green Creek for Daily Average and Daily minimum water quality standards.
- (46) The discharge of nutrients, including phosphorus, into a receiving water results in the lowering of dissolved oxygen levels in that water.
- (47) The draft permit authorizes new off-site application fields, which are new sources of nutrients, including phosphorus, into Green Creek.
- (48) The discharge of nutrients from the operation of new off-site application fields will cause or contribute to low dissolved oxygen levels in Green Creek.
- (49) The discharge of nutrients from the operation of new off-site application fields will cause or contribute to elevated amounts of nutrients and aquatic plant growth present in Segment 1226 of the North Bosque River.
- (50) The draft permit authorizes the discharge of nutrients into Green Creek from the retention control structures at Hidden View Dairy.
- (51) The discharge of nutrients from the retention control structures at Hidden View Dairy will cause or contribute to low dissolved oxygen levels in Green Creek.

- (52) The discharge of nutrients from the retention control structures at Hidden View Dairy will contribute to the amount of nutrients present in Segment 1226 of the North Bosque River.

Unavailability of RCS Plan

- (53) The draft permit does not include the nutrient management plan.<sup>31</sup>
- (54) The retention control structure management plan has not been provided to TCEQ, nor has it been reviewed by TCEQ.<sup>32</sup>
- (55) The draft permit does not include the terms and requirements of the retention control structure management plan for Hidden View Dairy.
- (56) Hidden View Dairy has completed engineering plans for the new retention control structure.<sup>33</sup>
- (57) The RCS Management Plan has not been provided to the public.

Unavailability of CNMP

- (58) Hidden View Dairy is located in a major sole-source impairment zone.
- (59) The permit requires the implementation of a comprehensive nutrient management plan.<sup>34</sup>
- (60) The draft permit does not include the terms and requirements of the comprehensive nutrient management plan developed for Hidden View Dairy.
- (61) The complete comprehensive nutrient management plan for Hidden View Dairy has not been provided to the TCEQ.<sup>35</sup>

<sup>31</sup> Ex. ED-4; Tr. p. 240, l. 10 - 14.

<sup>32</sup> Tr. p. 74, l. 13 - 16; Tr. p. 125, l. 19 - 23; Tr. p. 225 l. 23 - 25.

<sup>33</sup> Tr. p. 75, l. 18-20.

<sup>34</sup> Ex. ED-4, p. 13; Ex. ED-5, p. 6.

- (62) TCEQ has not reviewed the comprehensive nutrient management plan.<sup>36</sup>

Lack of Specificity

- (63) Hidden View Dairy has not identified the off-site land application fields.<sup>37</sup>

**B. Conclusions of Law**

- (27) 40 CFR §§ 122.4(a), 122.4(d) and 122.4(i) have been incorporated by reference into Title 30 of the Texas Administrative Code at 30 TAC § 305.538.

40 CFR 122.4(a)

- (28) 40 CFR § 122.4(a) prohibits the issuance of a permit to a new source or new discharger, when the conditions of the permit do not provide for compliance with the applicable requirements of the Clean Water Act, or regulations promulgated under the Clean Water Act.
- (29) The State narrative water quality standards for Segment 1226 of the North Bosque River related to nutrients and aquatic plant growth constitute requirements and regulations promulgated under the Clean Water Act.
- (30) The State water quality standards for Green Creek related to daily average and minimum dissolved oxygen concentrations constitute requirements and regulations promulgated under the Clean Water Act.

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<sup>35</sup> Tr. p. 175, l. 2 - 12; p. 176, l. 9 - 16.

<sup>36</sup> Tr. p. 228, l. 10 - 19.

<sup>37</sup> Tr. p. 237, l. 9 - 18; Tr. p. 263, l. 6 - 11.

- (31) Since the draft permit does not provide for compliance with the water quality standards for Segment 1226 of the North Bosque River related to nutrients and aquatic plant growth, issuance of the permit would violate 40 CFR § 122.4(a).
- (32) Since the draft permit does not provide for compliance with all water quality standards for dissolved oxygen in Green Creek, issuance of the permit would violate 40 CFR § 122.4(a), and should be denied.

40 CFR 122.4(d)

- (33) 40 CFR § 122.4(d) prohibits the issuance of a permit to a new source or new discharger, when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all states.
- (34) The State narrative water quality standards related to nutrients and aquatic plant growth constitute applicable water quality requirements of the State of Texas.
- (35) Since the draft permit does not include conditions which ensure compliance with the water quality standards for dissolved oxygen in Green Creek, issuance of the permit would violate 40 CFR § 122.4(d).
- (36) Since the draft permit does not include conditions which would ensure compliance with the Texas narrative water quality standards related to nutrients and aquatic life in Segment 1226 of the North Bosque River, issuance of the permit would violate 40 CFR § 122.4(d).

40 CFR 122.4(i)

- (37) 40 CFR § 122.4(i) prohibits the issuance of a permit to a new source or new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.
- (38) The State water quality standards related to daily average and minimum dissolved oxygen concentrations constitute applicable water quality requirements of the State of Texas.
- (39) Because the discharge of nutrients from off-site application fields into Green Creek will cause or contribute to the violation of dissolved oxygen water quality standards in Green Creek, issuance of the draft permit would violate 40 CFR § 122.4(i).

Document Unavailability

- (40) A copy of each TPDES permit application, and each TPDES permit issued shall be available to the public. 33 U.S.C. § 1342(j); Memorandum of Agreement Between TNRCC and EPA, p. 6.
- (41) All applicable effluent limitations must be included in each TPDES permit.
- (42) The term "effluent limitation" includes any restriction established by the TCEQ on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into water in the state.
- (43) TCEQ rules require that confined animal feeding operations develop and implement a nutrient management plan certified in accordance with the Natural Resources Conservation Service Code 590 Practice Standard. 30 TAC § 321.36(d)(1).
- (44) The retention control structure management plan is part of the nutrient management plan. 40 CFR § 122.42(e)(1)(i); incorporated at 30 TAC § 305.531(2)

- (45) TCEQ Rules require that all dairy CAFOs in a major sole-source impairment zone shall develop and operate under a comprehensive nutrient management plan (CNMP) certified by the Texas State Soil and Water Conservation Board. 30 TAC § 321.42(s).
- (46) The nutrient management plan for Hidden View Dairy, including the terms and restrictions contained in that plan, is an effluent limitation applicable to Hidden View Dairy.
- (47) The entire comprehensive nutrient management plan, including all terms and restrictions contained in the comprehensive nutrient management plan, is an effluent limitation applicable to Hidden View Dairy.
- (48) The retention control structure management plan has not been provided to the TCEQ or the public, and so the nutrient management plan has not been fully provided to TCEQ and the public.
- (49) Since not all contents of the nutrient management plan have been provided in Hidden View Dairy's application, and were not available to the public during the permitting process, the application is deficient, and should be denied.
- (50) Since the nutrient management plan, including the terms and restrictions contained in that plan, has not been included in the draft permit, the draft permit does not comply with the Clean Water Act, and the permit should be denied.
- (51) Since the comprehensive nutrient management plan, including the terms and restrictions contained in that plan, have not been included in the draft permit, the draft permit does not comply with the Clean Water Act, and the permit should be denied.
- (52) Since the comprehensive nutrient management plan, including the terms and restrictions contained in that plan, have not been available to the public during the permitting

process, the draft permit has not been processed in compliance with the Clean Water Act, and should be denied.

- (53) Since no information has been provided regarding the characteristics of off-site application fields, no copy of the retention control structure management plan has been provided, and a complete copy of the comprehensive nutrient management plan has not been provided, the information available is insufficient to support a meaningful review of the application, and the draft permit should be denied.

## V. Anti-Degradation

### A. Findings of Fact

- (64) Neither the Applicant nor the Executive Director have examined the impact of off-site application fields.<sup>38</sup>
- (65) The draft permit authorizes the discharge of nutrients and pathogens from retention control structures into Green Creek and Segment 1226 of the Bosque River Watershed.
- (66) No Tier 2 Antidegradation analysis has been performed related to the impact of nutrients or pathogens discharged from the facility and proposed off-site application fields.
- (67) Without an examination of the impact of off-site application fields, Applicant cannot demonstrate that the draft permit will not increase the pollution of water in the state, including increased pollution of Green Creek and Segment 1226 of the North Bosque River Watershed.
- (68) Segment 1226 of the North Bosque River was initially listed as impaired under narrative water quality standards related to nutrients and aquatic plant growth in 1998.<sup>39</sup>

<sup>38</sup> Tr. p. 263, l. 6 – 11; Tr. p. 285, l. 1 – 3;

<sup>39</sup> Ex. A-33, p. 2.

- (69) The TMDL for Segment 1226 of the North Bosque River indicates that degradation in the ambient water quality in Segment 1226 of the North Bosque River has occurred since November 28, 1975.<sup>40</sup>
- (70) Green Creek has been initially listed as impaired for dissolved oxygen within the past 10 years.
- (71) Parc Smith has testified that the water quality of Greens Creek has been degraded since November 28, 1975.<sup>41</sup>
- (72) Green Creek has been recognized as impaired for dissolved oxygen parameters since November 28, 1975.
- (73) There is information indicating that degradation in ambient water quality has occurred in Green Creek since November 28, 1975.
- (74) Applicant has not demonstrated that Green Creek did not exceed fishable swimmable quality on November 28, 1975.
- (75) Dissolved oxygen baseline concentrations for Green Creek or Segment 1226 of the North Bosque River on November 28, 1975 have not been established.
- (76) Bacteria baseline concentrations for Green Creek or Segment 1226 of the North Bosque River on November 28, 1975 have not been established.
- (77) No TMDL has been adopted to address the dissolved oxygen impairment of Green Creek.
- (78) No TMDL has been adopted to address pathogen or bacteria contamination of Segment 1226 of the North Bosque River.

<sup>40</sup> Ex. A-33, pp. 6-7.

<sup>41</sup> Ex. PS-1, p. 6, l. 1-3; p. 7, l. 22 - 23.

**B. Conclusions of Law**

- (54) The antidegradation policy and implementation procedures set forth in 30 TAC § 307.5 apply to the authorization of discharges which would increase pollution of the water in the state. 30 TAC § 307.5(a).
- (55) No water quality permit authorizing a discharge that would increase pollution of water in the state may be issued unless water quality sufficient to protect existing uses will be maintained. 30 TAC § 307.5(b)(1).
- (56) No discharge which would cause degradation of waters which exceed fishable/swimmable quality will be allowed unless it can be shown that the lowering of water quality is necessary for important economic or social development. 30 TAC § 307.5(b)(2).
- (57) The highest water quality sustained since November 28, 1975 defines baseline conditions for determinations of degradation. 30 TAC § 307.5(c)(2)(B).
- (58) Baseline water quality conditions are estimated from existing conditions unless there is information indicating that degradation in ambient water quality has occurred in the receiving waters since November 28, 1975. 40 CFR Part 131; Texas Commission on Environmental Quality: PROCEDURES TO IMPLEMENT THE TEXAS SURFACE WATER QUALITY STANDARDS, January, 2003 (RG-194), p. 31.<sup>42</sup>
- (59) Where there is information indicating that degradation in ambient water quality has occurred in the receiving waters since November 28, 1975, then the applicable date for establishing baseline water quality conditions. 40 CFR Part 131; Texas Commission on

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<sup>42</sup> Ex. A-52.

Environmental Quality: PROCEDURES TO IMPLEMENT THE TEXAS SURFACE WATER QUALITY STANDARDS, January, 2003 (RG-194), p. 31.<sup>43</sup>

- (60) Since there is information indicating that degradation in ambient water quality has occurred in Segment 1226 of the North Bosque River since November 28, 1975, the applicable date for establishing baseline water quality conditions in Segment 1226 of the North Bosque River is November 28, 1975.
- (61) Since there is information indicating that degradation in ambient water quality has occurred in Green Creek since November 28, 1975, the applicable date for establishing baseline water quality conditions in Green Creek is November 28, 1975.
- (62) The cumulative effect of repeated small increases in successive permit actions from multiple discharges may require additional screening evaluation, even if the increase from the current application is small. 40 CFR Part 131; Texas Commission on Environmental Quality: PROCEDURES TO IMPLEMENT THE TEXAS SURFACE WATER QUALITY STANDARDS, January, 2003 (RG-194), p. 32.<sup>44</sup>
- (63) Establishing baseline water quality conditions is necessary in order to determine whether a permitting action will increase pollution of water in the state, and thus whether the antidegradation policy applies.
- (64) Establishing baseline water quality conditions is necessary to determine whether receiving waters exceed fishable/swimmable water quality.

<sup>43</sup> Ex. A-52.

<sup>44</sup> Ex. A-52.

- (65) Establishing baseline water quality conditions is necessary to determine whether a proposed discharge will cause a lowering of water quality by more than a de minimis extent, but not to the extent that an existing use is impaired.
- (66) Where a TMDL has been adopted for a specific stream, permits consistent with the TMDL will not be subject to a separate anti-degradation review for the specific parameters addressed in the TMDL. 30 TAC § 307.5(c)(2)(G).
- (67) If no TMDL has been adopted that specifically addresses a water quality parameter, an antidegradation analysis is required for that parameter.
- (68) Since no TMDL specifically addressing dissolved oxygen in Green Creek has been developed, an anti-degradation analysis for dissolved oxygen in Green Creek is required.
- (69) Since baseline water quality conditions have not been established for dissolved oxygen in Green Creek, and no TMDL has been developed that specifically addresses dissolved oxygen in Green Creek, the antidegradation analysis is deficient. So, the permit should be denied.
- (70) Since no TMDL for bacteria in Segment 1226 of the North Bosque River has been developed, an anti-degradation analysis for the impact of a bacteria discharge into Segment 1226 of the North Bosque River is Required.
- (71) Since baseline concentrations for bacteria have not been established for Segment 1226 of the North Bosque River Watershed, the anti-degradation analysis is deficient, so the permit must be denied.

## VI. Pathogen Control

### A. Findings of Fact

- (79) The EPA has not promulgated national effluent limitations for pathogens, including bacteria, discharged from CAFOs.
- (80) The wastewater and sludge contained in the retention control structures will contain bacteria, including the indicator bacteria used to measure bacteria levels in streams.<sup>45</sup>
- (81) The discharge of the contents of a retention control structure into Greens Creek will result in the release of bacteria into Green Creek.<sup>46</sup>
- (82) No specific analysis was performed to determine the effectiveness of the management practices required in the permit to control pathogens or bacteria.<sup>47</sup>
- (83) No evidence has been presented regarding the following factors with regard to effluent limitations for pathogens, including fecal coliform:
  - (i) The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent benefits derived;
  - (ii) The comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources;
  - (iii) The age of the equipment and facilities involved;
  - (iv) The process employed;
  - (v) The engineering aspects of the application of various types of control techniques;
  - (vi) Process changes; and
  - (vii) Non-water quality environmental impacts (including energy).

<sup>45</sup> TR. p. 312, l. 6 - 17.

<sup>46</sup> TR. p. 313, l. 13 - 19.

<sup>47</sup> Tr. p. 224, l. 4 - 9.

### B. Conclusions of Law

(72) Where the EPA has not promulgated effluent limitations for a pollutant, the permitting authority must employ its best professional judgment to set technology-based limitations on a case-by-case basis. 40 CFR 125.3(a)(2)(ii)(B).

In setting case-by-case limitations, a permit writer must consider:

- (i) The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent benefits derived;
- (ii) The comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources;
- (iii) The age of the equipment and facilities involved;
- (iv) The process employed;
- (v) The engineering aspects of the application of various types of control techniques;
- (vi) Process changes; and
- (vii) Non-water quality environmental impacts (including energy).

40 CFR 125.3(d)(2).

(73) Since no consideration has been given to the factors set forth at 40 CFR 125.3(d)(2) when establishing control technologies for pathogens (including bacteria) in the permit, the control technologies for bacteria included in the permit have not been shown to be sufficient, and the permit should be denied.

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**FAX COVER SHEET**

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	<b>Chris Pepper</b>	
	<b>Robert Brush, TCEQ</b>	<b>239-0606</b>
	<b>Garrett Arthur, OPIC, TCEQ</b>	<b>239-6377</b>
	<b>TCEQ Chief Clerk</b>	<b>239-3311</b>

**From:** Eric Allmon

**Date:** December 15, 2008

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