



State Office of Administrative Hearings

Kristofer S. Monson
Chief Administrative Law Judge

August 19, 2022

Mary Smith
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Texas Commission on Environmental Quality
12100 Park 35 Circle, Bldg. F, Room 4225
Austin Texas 78753

VIA EFILE TEXAS

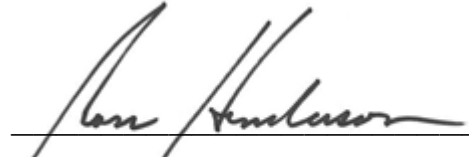
**Re: SOAH Docket No. 582-22-1085; TCEQ Docket No. 2021-1003-
AGR; Van Ruiten Dairy Partners**

Dear Ms. Smith:


The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision on Summary Disposition and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than September 8, 2022. Any replies to exceptions or briefs must be filed in the same manner no later than 10 CALENDAR DAYS FROM EXCEPTIONS OR BRIEFS DEADLINE.

This matter has been designated **TCEQ Docket No. 2021-1003-AGR;** **SOAH Docket No. 582-22-1085.** All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www14.tceq.texas.gov/epic/eFiling/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.



Ross Henderson,
Presiding Administrative Law Judge



Christiaan Siano
Presiding Administrative Law Judge

CC: Service List

**BEFORE THE
STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**APPLICATION BY VAN RUITEN DAIRY PARTNERS FOR A
MAJOR AMENDMENT TO TPDES PERMIT NO. WQ0003290000**

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PROPOSAL FOR DECISION

Van Ruiten Dairy Partners (Van Ruiten or Applicant) filed an application with the Texas Commission on Environmental Quality (TCEQ or Commission) for a Texas Pollutant Discharge Elimination System permit for a concentrated animal feeding operation (CAFO) in Erath County. TCEQ's executive director (ED) recommended granting the application and issuing a Draft Permit as proposed. The Commission referred the application to the State Office of Administrative Hearings (SOAH) for a contested-case hearing on three issues. The Administrative Law Judges (ALJs) granted summary disposition on two issues. Having considered the evidence relating to the one remaining issue in the context of the governing law, the ALJs recommend that the application be approved and draft permit No. TX0130087 be issued.

I. INTRODUCTION

A. REGULATORY FRAMEWORK

This case concerns TCEQ’s exercise of authority delegated from both the state and federal governments to administer the Texas Pollution Discharge Elimination System (TPDES) program, which implements, within TCEQ’s jurisdiction, the National Pollution Discharge Elimination System (NPDES), a permitting system established under the federal Clean Water Act.¹ Chapter 26 of the Texas Water Code requires a person who seeks to discharge wastewater into water in this State to file an application with TCEQ.² Title 30 Texas Administrative Code, chapter 305, subchapter C, prescribes the TCEQ’s application-filing requirements. Once an application is filed, the ED or delegees review the application in accordance with 30 Texas Administrative Code chapter 281.³ Based on a technical review, the ED prepares a draft permit that is to be consistent with rules promulgated by the federal Environmental Protection Agency and TCEQ, along with a technical summary that discusses the application and

¹ See 33 U.S.C. §§ 1311(a), 1342(a)(1), (b); 63 Fed. Reg. 51,164 (Sept. 24, 1998); Memorandum of Agreement between the Texas Commission on Environmental Quality and the U.S. Environmental Protection Agency, Region 6 Concerning the National Pollution Discharge Elimination System (TCEQ-EPA MOA), *available at* https://www.epa.gov/sites/default/files/2021-01/documents/attachment_d_-_2020_tpdes_moa_1_002.pdf (last accessed May 2, 2022). To the extent necessary, the ALJ takes official notice of the TCEQ-EPA MOA, which like a statute or rule helps define the legal framework within which this case arises.

² Tex. Water Code §§ 26.027(b), .121; *see id.* § 26.001(5) (defining “water” and “water in this state” as “groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, wetlands, marshes, inlets, canals, the Gulf of Mexico, inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state”).

³ 30 Tex. Admin. Code § 281.2(2).

significant factual, legal, methodological, and policy questions considered while preparing the draft permit.⁴

A CAFO in Texas is subject to wastewater-discharge permit requirements.⁵ Title 30 Texas Administrative Code, chapter 305, subchapter F contains TCEQ’s standard permit requirements, which the ED has adopted specifically for use in wastewater-discharge permits. All wastewater-discharge permits are also subject to regulations found in chapter 319, which require the permittee to monitor its effluent and report the results as required in the permit.

CAFOs are specifically subject to Subchapter B of Chapter 321 of TCEQ’s Rules.⁶ The CAFO Rules require Applicant to obtain air quality authorization under the Texas Clean Air Act as part of its permit.⁷ As a part of this air authorization, a CAFO is required to “be operated in such a manner as to prevent the creation of a nuisance as defined by Texas Health and Safety Code, § 341.011 and 30 Tex. Admin. Code § 321.32(32) of [Title 30], and as prohibited by §101.4 of [Title 30].”⁸ The rules also require Applicant to take necessary action to identify and abate any nuisance condition that occurs as soon as practicable.⁹

⁴ 30 Tex. Admin. Code § 281.21(b)-(c).

⁵ Tex. Water Code ch. 26; *see, e.g.*, 30 Tex. Admin. Code chs. 305, 307 (applying to all wastewater-discharge permits), 319, 321, Subchapter B (relating to concentrated animal feeding operations).

⁶ 30 Tex. Admin. Code § 321.33(a).

⁷ 30 TAC § 321.43; Tex. Health & Safety Code, Chapter 382, Subchapter C.

⁸ 30 TAC § 321.43(j).

⁹ 30 Tex. Admin. Code § 321.43(j)(B).

CAFOs located in areas designated as a major sole source impairment zone are subject to additional regulation.¹⁰ Dairy CAFOs in the watershed are required to obtain individual permits and are subject to stricter operational and reporting requirements.¹¹ The North Bosque River Watershed is a major sole-source impairment zone.¹²

B. BURDENS OF PROOF

The burden of proof on these issues lies with Applicant, by a preponderance of the evidence.¹³ However, effective September 1, 2015, the Legislature made significant changes impacting how this burden may be met and the relative evidentiary burden imposed on Protestants as opposing parties.

TCEQ referred this case to SOAH under Texas Water Code § 5.556, which governs referral of environmental-permitting cases to SOAH based on a request for a contested-case hearing.¹⁴ Consequently, this case is governed by the 2015 legislation, added through Senate Bill (S.B.) 709 and codified in Texas Government Code § 2003.047(i-1) through (i-3).¹⁵ Section 2003.047(i-1) states:

(i-1) In a contested case regarding a permit application referred under Section 5.556 . . . [of the] Water Code, the filing with

¹⁰ See generally Tex. Water Code §§ 26.501-.504.

¹¹ 30 TAC §§ 321.32(33), .33(b)(2), .36(f), .40(k)(3), .42.

¹² Administrative Record (AR) Tab D at Bates 137; AR Tab C at Bates 64; see *Draft 2022 Texas Integrated Report – Texas 303(d) List* at 25 (adopted by the Commission on June 1, 2022, pending EPA approval); see also 31 TAC § 523.7

¹³ 30 Tex. Admin. Code § 80.17(a).

¹⁴ Tex. Water Code §§ 5.551(a), .556.

¹⁵ Acts 2015, 84th Leg., R.S., ch. 116 (S.B. 709), §§ 1 and 5, eff. Sept. 1, 2015.

[SOAH] of the application, the Draft Permit prepared by the executive director of the commission, the preliminary decision issued by the executive director, and other sufficient supporting documentation in the administrative record of the permit application establishes a prima facie demonstration that:

- (1) the Draft Permit meets all state and federal legal and technical requirements; and
- (2) a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property.

TCEQ has by rule specified that the “prima facie demonstration” described in Section 2003.047(i-1) is established by the “filing of the administrative record as described in § 80.118(c) of [Title 30 Texas Administrative Code] (relating to Administrative Record).”¹⁶ Section 80.118(c) in turn prescribes that this “administrative record” includes certified copies of the following documents:

- (1) the items in subsection (a)(1) – (6) of this section, including technical memoranda, that demonstrate the Draft Permit meets all applicable requirements and, if issued, would protect human health and safety, the environment, and physical property; and
- (2) the application submitted by the applicant, including revisions to the original submittal.¹⁷

The provisions referenced in paragraph (c)(1), subsection (a)(1) through (6) of 30 Texas Administrative Code § 80.118, list the following items as components

¹⁶ 30 Tex. Admin. Code §§ 80.17(c)(1), .117(c)(1); *accord id.* § 80.127(h) (“the filing of the administrative record as described in § 80.118 of this title (relating to Administrative Record)” establishes the “prima facie demonstration”).

¹⁷ 30 Tex. Admin. Code § 80.118(c).

included in the “administrative record”: (1) the ED’s final Draft Permit; (2) the ED’s decision on the permit application; (3) the summary of the technical review of the permit application; (4) “the compliance summary of the applicant”; (5) copies of the public notices relating to the permit application and affidavits concerning those notices; and (6) “any agency document determined by the [ED] to be necessary to reflect the administrative and technical review of the application.”¹⁸

TCEQ rules further prescribe that the ALJ in a contested-case hearing governed by the S.B. 709 framework “shall admit the administrative record [as defined above] into evidence for all purposes.”¹⁹ And, “the applicant’s presentation of evidence to meet its burden of proof may consist solely of the filing with [SOAH], and admittance by the judge, of the administrative record [so defined].”²⁰ But this “demonstration” is subject to being controverted.²¹ Per Texas Government Code § 2003.047(i-2):

(i-2) A party may rebut a [prima facie] demonstration under Subsection (i-1) by presenting evidence that:

(1) relates to . . . an issue included in a list [of disputed issues provided by the TCEQ] in connection with a matter referred under Section 5.556, Water Code [*i.e.*, the issues referred in the Interim Order]; and

¹⁸ 30 Tex. Admin. Code § 80.118(a).

¹⁹ 30 Tex. Admin. Code § 80.127(h).

²⁰ 30 Tex. Admin. Code § 80.117(b).

²¹ Prima facie. The American Heritage Dictionary of the English Language (5th ed. 2022) (“True, authentic, or adequate at first sight; ostensible: *prima facie evidence*.”); Prima facie case. Black’s Law Dictionary (11th ed. 2019) (“The establishment of a legally required rebuttable presumption” and “[a] party’s production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party’s favor”).

- (2) demonstrates that one or more provisions in the draft permit violate a specifically applicable state or federal requirement.

And § 2003.047(i-3) further provides:

- (i-3) If in accordance with Subsection (i-2) a party rebuts a presumption established under Subsection (i-1), the applicant and the executive director may present additional evidence to support the draft permit.²²

Thus, under those provisions the applicant is deemed to have met its burden of proof based on the “prima facie demonstration,” through the admission of the administrative record, subject to Protestants’ opportunity to rebut by “presenting evidence” relating to a referred issue that, as compared to the administrative record, would preponderate in favor of a contrary finding or conclusion that “one or more provisions in the Draft Permit violate a specifically applicable state or federal requirement.”

C. FACILITY AND AMENDMENT

The Van Ruiten Dairy is a 229-acre dairy farm in Iredell, Erath County, Texas, permitted for a maximum of 990 head cattle, but averaging 741.²³ The dairy is located in the North Bosque River Watershed.²⁴

²² The TCEQ rules implementing these provisions are substantively identical. *See* 30 Tex. Admin. Code §§ 80.17(c), .117(c).

²³ AR Tab C at 13 (Draft Permit, IV); App. Ex. 5 at 1 (L. Van Ruiten Dir.).

²⁴ App. Ex. 10 at 7 (Mullin Dir.); AR Tab D at 13.

Currently owned by the Van Ruiten Family, the farm was purchased from the estate of the previous owner and operator, Peter DeRidder, in 2020.²⁵ A transfer of permit ownership was submitted with the application which changed ownership of the dairy to Van Ruiten Dairy Partners.²⁶ Upon acquisition of the dairy, the Van Ruitens implemented several clean up measures. They changed the method of handling manure:²⁷ instead of flushing the freestall barns with water and pushing the manure and sand into lagoons, the Van Ruitens began collecting the manure in a vacuum tank several times daily.²⁸ They removed the existing manure from the lagoons and mounds.²⁹ They took measures to eliminate standing water and moisture by repairing and burying broken water lines, repairing and evening roads and sloping issues.³⁰

Shortly after the transfer, on April 22, 2020, the Van Ruitens filed an application for major amendment and renewal of water quality permit, seeking to make the necessary changes to the facility to ensure continued environmental compliance.³¹ Specifically, the application seeks authorization to:

1. replace the list of alternative crops and yield goals;
2. add one new land management unit (LMU) #4 (18 acres);
3. reconfigure existing LMUs;

²⁵ App. Ex. 5 at 1 (L. Van Ruiten Dir.).

²⁶ AR Tab C at 1 (ED response to Hearing Request).

²⁷ App. Ex. 5 at 1 (L. Van Ruiten Dir.).

²⁸ App. Ex. 5 at 1 (L. Van Ruiten Dir.).

²⁹ App. Ex. 5 at 1-2 (L. Van Ruiten Dir.).

³⁰ App. Ex. 5 at 2 (L. Van Ruiten Dir.).

³¹ AR Tab B, 49-51; Tab D.

4. add a freestall barn to the production area;
5. add a water well to the permit;
6. reconfigure drainage areas of the retention control structures (RCSs); and
7. increase the total land application area from 93 to 138 acres.³²

The existing authorized maximum capacity of 990 head of total dairy cattle will not change.³³

D. PROCEDURAL HISTORY AND POSTURE

TCEQ received the Application on April 22, 2020, and declared it administratively complete on September 29, 2020. The ED completed technical review on March 3, 2021, and prepared a draft permit that, if approved, would establish the conditions under which the facility must operate.³⁴ Applicant published a Notice of Receipt of Application and Intent to Obtain a Water Quality Permit in the *Stephenville Empire Tribune* on October 7, 2020 and a Notice of Application and Preliminary Decision, on March 31, 2021, also in the *Stephenville Empire Tribune*.³⁵ The public comment period closed on April 30, 2021.

In response to public comment, the ED decided that the application met the requirements of the law and made no changes to the draft permit. The ED filed a

³² App. Ex. 10, 5:5-20 (Mullin Dir.); AR, Tab C at 52 (Fact Sheet and Executive Director's Preliminary Decision).

³³ App. Ex. 10 at 8:28-30 (Mullin Dir.); Admin. Rec., Tab C, 52.

³⁴ AR Tab B, 26-28.

³⁵ AR Tab B at 22.

response to comments on June 16, 2021, and the TCEQ’s Chief Clerk mailed the ED’s Decision and Response to Comments on June 18, 2021, which triggered a 30-day deadline for filing requests for a contested-case hearing or reconsideration of the ED’s decision.³⁶ TCEQ received a timely filed request for hearing from Monica Warden.³⁷

Following an open meeting on November 3, 2021, the Commission by Interim Order found Monica Warden to be an affected person and granted her request for a contested-case hearing, referred three issues (described in Section I.E. of this proposal for decision (PFD)) to SOAH, and established a 180-day deadline from the date of the preliminary hearing for the SOAH ALJ to issue the PFD.³⁸

The preliminary hearing convened via videoconference on February 22, 2022.³⁹ At the preliminary hearing, the ALJ took official notice of the administrative record (Tabs A-D), which had been filed with SOAH; determined that SOAH had jurisdiction; named parties; and required the parties to submit a proposed procedural schedule.⁴⁰ Admitted as parties—in addition to the Applicant, the ED, and the Office of Public Interest Counsel (OPIC)—were protestants Monica Warden and James Carlile (collectively, Protestants), who are represented by Monica Warden.

³⁶ AR Tab C at 74.

³⁷ AR Tab C at Bates 1 (ED’s response to hearing Request). At the hearing and in post-hearing briefing, Ms. Warden repeatedly denied requesting a contested case hearing, maintaining she had only requested a public hearing. Nevertheless, she did not withdraw her request.

³⁸ AR Tab A (Interim Order).

³⁹ AR Tab B at 1-20 (Notice of Preliminary Hearing, January 12, 2022);

⁴⁰ SOAH Order No. 1 (Feb. 24, 2022).

On May 13, 2022, the Applicant filed a motion for summary disposition, arguing that Protestants’ and OPIC’s prefiled evidence failed to controvert the statutory presumption that the Draft Permit meets all state and federal legal and technical requirements and, if issued, would be protective of human health and safety, the environment, and physical property. A prehearing conference convened via videoconference on May 23, 2022 to consider Applicant’s and Protestants’ motions, objections, and motions to strike and Applicant’s Motion for Summary Disposition.⁴¹ After hearing argument, the ALJs granted the motion for summary disposition with respect to issues A and C and denied the motion with respect to issue B. Accordingly, only issue B is analyzed in this PFD.⁴² The hearing on the merits convened via videoconference immediately following the prehearing conference and concluded the same day.⁴³ The record closed on June 20, 2022, with the submission of post-hearing written arguments. In post-hearing arguments, only Protestants contest whether the Draft Permit meets applicable requirements with regard to the remaining issue referred to SOAH.

⁴¹ The ALJs granted Applicant’s motion to strike attachments to Protestants’ testimony, including scholarly and scientific articles, because the attachments were hearsay with no applicable exception. The ALJs denied all other objections and motions to strike. The ALJs also announced they would give no weight to evidence relating to issues that were not referred and beyond the jurisdiction of the Commission to consider in this application, including groundwater drawdowns and property devaluation.

⁴² The ALJs granted the motion for summary disposition on issues A and C because the Protestants failed to meet their burden to produce any evidence on those issues as required by 30 Texas Administrative Code § 80.117(c)(3).

⁴³ All cites to the hearing on the merits transcript are written as “Tr. at ___.”

E. GRANTING IN PART AND DENYING IN PART APPLICANT’S POST-HEARING MOTION TO STRIKE

After the hearing, the parties were required to e-file their exhibits that were admitted during the hearing. On June 13, 2022, Applicant filed a motion to strike portions of Protestants’ e-filed exhibits on the basis that the portions allegedly included post-hearing alterations to those exhibits and that the alterations were prejudicial to Applicant. After reviewing the motion and the exhibits filed by Protestants before and after the hearing, the motion is granted in part and denied in part.

In its motion, Applicant alleged that Protestants’ post-hearing filing of exhibits included the following alterations:

1. New title pages and headers that label photographs as “nuisances;”
2. Added page – email from Ruby Carlile; and
3. Added caption on page 24 “The day after the waste water applied to LMU 1 and 2. I witnessed.”

After reviewing the exhibits filed before and after the hearing by Protestants, the ALJs find that only the alleged alteration in Objection 3 occurred.⁴⁴ Regarding Objections 1 and 2, the exhibits were consistent. The exhibits were previously admitted as filed with respect to those objections, and the objections are denied. However, Applicant’s Objection 3 is correct: the post-hearing exhibit added a new caption on page 24 that was not present in the pre-filed exhibits. Therefore, the ALJs grant Applicant’s motion to strike the additional caption. The portion of Protestant Exhibit C that reads, “The day after the waste water applied to LMU 1

⁴⁴ Protestants’ Exhibits (May 12, 2022); Protestants’ Exhibits (June 7, 2022)

and 2. I witnessed.” is struck from the record and will not be considered in this PFD.

F. REFERRED ISSUES

In the Interim Order, TCEQ referred the following three issues:

- A) Whether the Draft Permit is protective of water quality, including whether it contains adequate provisions to address stormwater runoff;
- B) Whether the Draft Permit adequately prevents nuisance conditions, including odor and flies; and
- C) Whether the Draft Permit is protective of the health of the requester and their family.

As noted above, summary disposition was granted on issues A and C, and only issue B is analyzed in this PFD.

G. EVIDENTIARY RECORD

As previously noted, at the preliminary hearing the ALJ took official notice of the administrative record previously filed with SOAH. The administrative record includes the interim order (Tab A), documents provided by the Office of the Chief Clerk (Tab B), documents provided by the executive director (Tab C), and documents provided by the applicant (Tab D). TCEQ rules, however, require that

the administrative record be admitted into evidence as a ministerial function.⁴⁵ Accordingly, the administrative record is ADMITTED into evidence.

Additionally, the following evidence was admitted during the hearing on the merits: Applicant offered 22 exhibits, which included the application, the Draft Permit and the prefiled testimony of owner Linda Van Ruiten, consultants Matthew Gray and Norman H. Mullins, P.E. with Enviro-Ag Engineering, Inc.⁴⁶ Protestants offered two exhibits, the prefiled testimony of Monica Warden and Mr. & Mrs. Carlile, and attachments. The ED offered sixteen exhibits, including the prefiled testimony and attachments of permit writer Joy Alabi, Ph.D., geoscientist Hannah Zellner, P.G., aquatic scientist Jenna Lueg, and agronomist Julie Rueckheim. OPIC did not offer any exhibits.

II. ANALYSIS

Protestants do not challenge specific provisions of the Draft Permit, but complain of perceived nuisance conditions, specifically odor and flies, on their property caused by the dairy.

⁴⁵ 30 Tex. Admin. Code § 80.127(h) (“The ALJ shall admit the administrative record into evidence for all purposes.”).

⁴⁶ App. Exs. 1-23, except Ex. 4.

A. LEGAL BACKGROUND

TCEQ rules do not directly address fly populations but do require that a CAFO dairy be operated to prevent the creation of a nuisance condition.⁴⁷ A nuisance is any discharge of air contaminants, including but not limited to odors of sufficient concentration and duration that are or may tend to be injurious to or that adversely affects human health or welfare, animal life, vegetation, or property, or that interferes with the normal use and enjoyment of animal life, vegetation, or property.⁴⁸ This also includes “a condition or place that is a breeding place for flies and that is in a populous area,” and “the maintenance of an open surface privy or an overflowing septic tank so that the contents may be accessible to flies.”⁴⁹ Such a discharge is prohibited.⁵⁰

B. DRAFT PERMIT

The Draft Permit addresses nuisance conditions, and thereby odor and fly management, by requiring the permittee to:

- a. implement a Pollution Prevention Plan (PPP) to assure compliance with the limitations and conditions of the permit (Draft Permit, VII(A)(1)(a)(3));

⁴⁷ 30 TAC § 321.43(j)(1)(A). Both the applicant and the ED cite the ED’s response to comments for what the permit and TCEQ rules require. The ALJs do not rely on those references because the ED’s response to comments is not the best evidence of that the permit or TCEQ rules required. Instead, the ALJs rely on those references directly to the draft permit or rules.

⁴⁸ 30 TAC § 321.32(36).

⁴⁹ Tex. Health & Safety Code § 341.011(1), (11).

⁵⁰ 30 TAC § 101.4.

- b. maintain the drainage area to minimize ponding or puddling or water outside the RCS(s) (Draft Permit, VII(A)(3)(c)(3));
- c. remove sludge during favorable wind conditions that carry odors away from nearby receptors (Draft Permit, VII(A)(5)(g));
- d. maintain earthen pens to ensure good drainage, minimize ponding (Draft Permit, VII(A)(6)(b));
- e. collect carcasses within 24 hours of death and properly disposed of carcasses within three days of death, in a manner to prevent a public health hazard and contamination of surface or groundwater, controls access, and minimizes odor (Draft Permit, VII(A)(6)(c));
- f. develop, implement, and operate under a certified Nutrient Management Plan (NMP) and a Comprehensive Nutrient Management Plan (CNMP) certified by the Texas State Soil and Water Conservation Board (Draft Permit, VII(A)(8)(a)-(b));
- g. within 48 hours, incorporate manure applied to third party fields into the soil to reduce odor (Draft Permit, VII(A)(8)(e)(5)(i)(B));
- h. manage irrigation to minimize ponding or puddling of wastewater on the site, prevent tailwater discharges to water in the state, and prevent the occurrence of nuisance conditions (Draft Permit, VII(A)(8)(f)(1));
- i. apply to land at night only if there are no residences located within one quarter of a mile from the outer boundary of the actual area receiving compost, manure, sludge, slurry and wastewater application and never between 12 a.m. and 4 a.m. during normal operating conditions (Draft Permit, VII(A)(8)(g)(1)-(2));
- j. inspect and test equipment to determine conditions that could cause breakdowns or failures resulting in discharge of pollutants to water in the state or the creation of a nuisance condition (Draft Permit, VII(A)(10)(a)(1)(i));
 - i. Inspect weekly all control facilities, including control devices for management of potential pollutant sources (Draft Permit, VII(A)(10)(a)(3)(i));

- ii. inspect monthly mortality management systems, including collection areas and disposal and storage of toxic pollutants, including pesticide containers (Draft Permit, VII(A)(10)(a)(4));
- iii. inspect annually the production area and LMUs to verify that (A) the description of potential pollutant sources is accurate, (B) the site plan/map has been updated or otherwise modified to reflect current conditions, and (C) the controls outlined in the PPP to reduce pollutants and avoid nuisance conditions are being implemented and are adequate (Draft Permit, VII(A)(10)(a)(5));
- k. prevent the discharge of pesticide contaminated waters into water in the state and handle all wastes from dipping vats, pest and parasite control units, and other facilities used for the application of potentially hazardous or toxic chemicals in a manner that prevents any significant pollutants from entering water in the state or creating a nuisance condition (Draft Permit, VII.B.3);
- l. operate the CAFO in such a manner as to prevent nuisance conditions of air pollution as mandated by Texas Health and Safety Code, Chapters 341 and 382 (Draft Permit, VII.B.4); and
- m. maintain updated records on daily, weekly, monthly, and annual basis respectively of operations, including required daily, weekly, monthly, and annual site and equipment inspections (Draft Permit, VIII).
- n. comply with all applicable rules and regulations of the TCEQ, including Chapter 321, Subchapter B (Draft Permit § IX(S)).⁵¹

C. PROTESTANTS' EVIDENCE AND ARGUMENT

Protestants' central theme is that the fly population has increased to the point of creating a nuisance condition since the Van Ruitens' acquisition of the

⁵¹ AR Tab C, 13-51 (Draft Permit).

dairy.⁵² Both Ms. Warden and Mr. Carlile testified that the flies and odor negatively affect their enjoyment of the outdoors. Ms. Warden testified that she cannot go outside without being bitten by flies.⁵³ She further testified that there are persistent dairy odors.⁵⁴ Mr. Carlile testified that odors have increase “200%” since the Van Ruitens’ acquisition.⁵⁵ The evidence shows that Ms. Warden’s residence is approximately one mile from the dairy production area.⁵⁶

In support of their position, the Protestants reference photographs which purport to show flies on windows, doors, traps, and vehicles at different times of the year, both wet and dry seasons. Protestants essentially argue that flies are “air contaminants,” as defined by Rule 321.32(36).⁵⁷ Protestants further argue that the pictures of flies during dry times negates the Applicant’s testimony that flies proliferate in wet seasons and that Applicant’s fly prevention efforts are not effective.⁵⁸

Finally, Protestants argue that the addition of the freestall barn has created a shaded area that is coveted by flies.⁵⁹

⁵² To the extent Protestants’ closing arguments go beyond the evidentiary record, they are disregarded.

⁵³ Prot. Ex. 1 at (unpaginated) 2 (Warden Dir.).

⁵⁴ Prot. Ex. 1 at (unpaginated) 2 (Warden Dir.).

⁵⁵ Prot. Ex. 2 at (unpaginated) 2 (Carlile Dir.).

⁵⁶ App. Ex. 16 (one-mile map).

⁵⁷ Prot. Initial Brief at 3.

⁵⁸ Tr. at 29 (L. Van Ruiten cross).

⁵⁹ Prot. Initial Brief at 4.

D. APPLICANT EVIDENCE AND ARGUMENT

Applicant argues that Protestants failed to rebut its prima facie demonstration establishing that the Draft Permit meets all state and federal legal and technical requirements and that if issued, the permit would protect human health and safety, the environment and physical property. Specifically, Applicant argues, Protestants failed to present evidence that one or more provisions in the Draft Permit violate a specifically applicable state or federal requirement that relates to an issue referred by TCEQ.

Instead, Applicant argues that the Draft Permit adequately addresses the prevention of nuisance and thereby fly management, referencing the provisions set out above (see section II(B)). Applicant also references evidence regarding its best management practices to control odor and flies and the steps the new owners have taken to clean up the dairy and further reduce fly habitat.⁶⁰

Moreover, Applicant witness Mr. Gray testified to Applicant's extensive fly control schedule, regular site maintenance of weeds, grass, trees, and brush that reduces potential habitats for fly growth, and regular consultation with a Texas A&M Agrilife entomologist regarding the most up-to-date fly control measures.⁶¹

Next, Applicant argues that Protestants failed to establish the origin of the flies in Protestants' photos. Applicant argues that the flies may originate on Protestants' own property' given the livestock trailer visible in many of

⁶⁰ App. Ex. 10 at 13-14 (Mullin Dir.); App. Ex. 6 at 8-9 (Gray Dir.).

⁶¹ App. Ex. 6 at 9-10 (Gray Dir.).

Protestants' photographs, and evidence that prevailing winds do not flow from the dairy production area towards Protestants' property negates the likelihood that the flies originate at the dairy.⁶² Applicant also notes that the head count is less than authorized and the permitted head count of 990 cows has not changed.⁶³

Applicant notes that the permit is subject to enforcement; however, Protestants never contacted the TCEQ regional office or Applicant regarding odor, flies, or any other conditions.⁶⁴

Regarding the addition of the freestall barn, Applicant argues that the shade it provides is not the type that attracts fly growth:⁶⁵ the manure is vacuumed and removed from the freestall barn multiple times daily,⁶⁶ keeping the barn free of manure and drier, discouraging fly growth.⁶⁷ Applicant's evidence also shows that the dairy regularly sprays and uses foggers in the freestall barn area to prevent fly breeding and the cows in the freestall barn are all treated with insecticide, through sprays and ear tags.⁶⁸ Thus, Applicant argues, there is no evidence that the freestall barn is a primary source of flies on Protestants' property.

⁶² App. Ex. 10 at 13 (Mullin Dir.); App. Ex. 6 at 9 (Gray Dir.); App. Ex. 16 (map).

⁶³ App. 5 at 3 (L. Van Ruiten); App. Ex. 10 at 8 (Mullin Dir.).

⁶⁴ Admin. Rec., Tab C (Draft Permit, IX A, F, R, S). Tr. 86:1-8 (Alabi Cross).

⁶⁵ Tr. at 27 (L. Van Ruiten Dir.).

⁶⁶ Tr. at 51 (Mullin Redir.); App. Ex. 10 at 14 (Mullin Dir.).

⁶⁷ Tr. at 51 (Mullin Redir.); App. Ex. 10 at 14 (Mullin Dir.).

⁶⁸ App. Ex. 5 at 4 (L. Van Ruiten); App. Ex. 6 at 9:27-31 (Gray Dir.).

E. ED'S EVIDENCE AND ARGUMENT

In support of the Draft Permit, the ED points to the testimony of its witness Joy Alabi, who testified that the proposed permit contains provisions that prevent nuisance conditions, including odor and flies, because the permit requires implementation of a certified Comprehensive Nutrient Management Plan (CNMP) that meets the Natural Resources Conservation Service (NRCS) requirements for a whole-farm Resource Management System.⁶⁹

Ms. Alabi explained that CNMP's are conservation plans unique to animal feeding operations and document the practices and management activities adopted by an applicant to address the natural resource concerns related to soil erosion, water quality, utilization of manure and wastewater, and disposal of organic by-products.⁷⁰

The ED argues that Draft Permit provisions listed above (see section II(B)) also: aim to avoid nuisances, such as flies, by reducing standing water; require that application of wastewater be managed to minimize ponding or puddling; prevent tailwater discharges to waters in the state; and prevent the occurrence of nuisance conditions.⁷¹

The Draft Permit further prevents odor and flies by requiring a PPP for proper operation and maintenance of the dairy, including the storage of manure,

⁶⁹ ED Ex. 1 at 12 (Alabi Dir.); ED Ex. 3 at 12 (Draft Permit, section VII.A.8).

⁷⁰ ED Ex. 1 at 12 (Alabi Dir.).

⁷¹ ED Ex. 3 at 12, section VII.A.8.(f).

site inspections, and identifying and preventing potential pollutant sources.⁷² In conclusion, the ED argues that the Draft Permit and the TCEQ rules, if followed, should prevent the dairy from causing odor or degradation of air quality.

F. OPIC'S POSITION

OPIC supports the issuance of the Draft Permit, arguing that it will adequately address nuisance conditions, including flies. In addition to the reasons cited by the Applicant and the ED, OPIC notes that the dairy owner, Ms. Van Ruiten, testified that her family, like Protestants, lives roughly one mile from the dairy, but that they do not have a substantial problem with flies, and make reasonable efforts to control flies at home like most people would in the country.⁷³ OPIC similarly questions the probative value of the photographs of flies on Protestants property, given that the TCEQ does not determine fly origin and the livestock trailers in the background of Protestants' photos.⁷⁴

G. ANALYSIS

At issue is whether the Draft Permit adequately prevents nuisance conditions, including odor and flies. By introduction of the administrative record, the Applicant made a prima facie demonstration that it does. The weight of the evidence shows that if followed, the Draft Permit, the TCEQ rules, and the

⁷² 30 TAC § 321.46; ED Ex. 3 at 12, section VII(A).

⁷³ Tr. at 35 (L. Van Ruiten Clarifying).

⁷⁴ Tr. at 81-82 (Alabi Cross).

practices and management activities adopted by the Applicant should prevent the dairy from causing odor or degradation of air quality. Although Protestants presented anecdotal evidence relating to the referred issue, they failed to demonstrate that one or more provisions in the Draft Permit violate a specifically applicable state or federal requirement. Further, Protestants' evidence did not prove that the dairy was the source of odor or flies. Finally, even if Protestants had proven that Applicant is currently causing nuisance odor and flies, their concerns bear more on whether the dairy is being operated according to its permit requirements and not whether the permit itself meets all requirements. Accordingly, the prima facie demonstration has not been rebutted.

In sum, Applicant has met its burden to prove, by a preponderance of the evidence, that the Draft Permit adequately prevents nuisance conditions, including odor and flies.

III. TRANSCRIPT COSTS

The Commission may assess reporting and transcription costs to one or more of the parties participating in a proceeding, and when doing so, must consider the following factors:

- (A) the party who requested the transcript;
 - (B) the financial ability of the party to pay the costs;
 - (C) the extent to which the party participated in the hearing;
 - (D) the relative benefits of the various parties of having a transcript;
- ... [and]

(G) any other factor which is relevant to a just and reasonable assessment of costs.⁷⁵

Additionally, the Commission will not assess reporting or transcription costs against the ED or OPIC because they are statutory parties who are precluded by law from appealing the Commission's decision.⁷⁶

In post-hearing briefing, Applicant requested assessment of reporting and transcription costs equally between Protestants and the Applicant, representing that it incurred a transcript cost of \$1,199.40 for the hearing on the merits. Applicant argues that there is no evidence that Protestants do not have the ability to pay and that both parties benefit from the transcript.

In opposing this assessment, Protestants emphasize that they did not request a contested case hearing. OPIC and the ED take no position on cost apportionment.

Applicant proposed the procedural schedule which included three days for a hearing. Protestants did not agree to the schedule, but it was adopted over Protestants' objections. Because the hearing was scheduled for more than one day, Applicant's proposal triggered the need for a transcript.⁷⁷ And although the hearing was scheduled for three days, it took less than three hours to complete. Therefore, the ALJs recommend that Applicant be assessed 100% of the transcript cost.

⁷⁵ 30 Tex. Admin. Code § 80.23(d)(1).


⁷⁶ 30 Tex. Admin. Code § 80.23(d)(2).

⁷⁷ See 30 Texas. Admin. Code §155.423.


IV. CONCLUSION

Based on the foregoing analysis, the ALJ recommends that the Commission grant the Application and issue the permit that the ED has proposed. For the same reasons, the ALJ further recommends that the Commission adopt all Findings of Fact and Conclusions of Law contained in the Proposed Order and decline to adopt any findings and conclusions proposed by the parties that are not included.⁷⁸

SIGNED AUGUST 19, 2022.



Ross Henderson,
Presiding Administrative Law Judge



Christiaan Siano,
Presiding Administrative Law Judge

⁷⁸ 30 Tex. Admin. Code § 80.252(d).



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**AN ORDER
GRANTING THE APPLICATION OF
VAN RUITEN DAIRY PARTNERS FOR RENEWAL AND MAJOR
AMENDMENT OF PERMIT NO. WQ0003290000;
TCEQ DOCKET NO. 582-22-1085;
SOAH DOCKET NO. 2021-1003-AGR**

On _____, the Texas Commission on Environmental Quality considered the application of Van Ruiten Dairy Partners for a major amendment and renewal of Texas Pollutant Discharge Elimination System Permit No. WQ0003290000—a permitted concentrated animal feeding operation in Erath County, Texas.

After considering the PFD, the Commission makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Background

1. On April 23, 2020, Van Ruiten Dairy Partners (Applicant) filed an Application for Major Amendment and Renewal of Water Quality Permit No. WQ0003290000 (Application) to authorize the Applicant to modify an existing dairy cattle Concentrated Animal Feeding Operation (CAFO) with the Texas Commission on Environmental Quality (TCEQ or Commission).
2. The Application seeks to make the following changes:
 - replace the list of alternative crops and yield goals;
 - add one new land management unit (LMU) – LMU #4 (18 acres);
 - reconfigure LMUs #1 (from 41 acres to 56 acres) and #2 (from 40 acres to 54 acres);
 - decrease LMU #3 (from 12 acres to 10 acres);
 - increase the total land application area from 93 to 138 acres;
 - add one existing water well (Well #5) to the permit;
 - add one freestall barn to the production area;
 - reconfigure the drainage areas of the retention control structures (RCS); and revised the design calculations for the RCSs.
3. The currently permitted maximum capacity of 990 head of total dairy cattle, all of which are milking cows, will not change.
4. The TCEQ Executive Director (ED) declared the Application administratively complete on September 29, 2020.

5. The ED determined the Application was technically complete on March 10, 2021, and issued a draft permit for the Application (Draft Permit).

Notice and Jurisdiction

6. On October 7, 2020, Applicant published a Notice of Receipt of Application and Intent to Obtain a Water Quality Permit in the *Stephenville Empire Tribune*.
7. On March 31, 2021, Applicant published the Notice of Application and Preliminary Decision in the *Stephenville Empire Tribune*.
8. The public comment period on the Application closed on April 30, 2021.
9. The ED filed his Response to Public Comments on June 14, 2021, and stated that no changes were made to the Draft Permit in response to comments.
10. On November 9, 2021, the Commissioners issued an Interim Order granting the hearing request of Monica Warden and referred the Application to the State Office of Administrative Hearings (SOAH) for an evidentiary contested case hearing regarding the three referred issues (the Referred Issues):
 - a. Whether the Draft Permit is protective of water quality, including whether it contains adequate provisions to address stormwater runoff;
 - b. Whether the Draft Permit adequately prevents nuisance conditions, including odor and flies; and
 - c. Whether the Draft Permit is protective of the health of the requester and their family.

Proceedings at SOAH

11. On January 5, 2022, the Chief Clerk mailed Notice of Public Hearing for the preliminary hearing to persons entitled to receive notice under TCEQ rules or who requested notice.

12. Notice of the Preliminary Hearing at SOAH was published on January 12, 2022.
13. On January 22, 2022, the Chief Clerk filed with SOAH the Application, the Draft Permit, the preliminary decisions issued by the ED, the Interim Order, and other supporting documentation in the Administrative Record of the Application.
14. The filing of the Administrative Record with SOAH constituted a prima facie demonstration that the Draft Permit meets all state and federal legal and technical requirements, and a permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property.
15. On February 22, 2022, Administrative Law Judge (ALJ) Ross Henderson conducted a preliminary hearing via video conference where jurisdiction was established, and the ALJ took official notice of the Administrative Record.
16. At the preliminary hearing, the ALJ admitted the Applicant, the ED, the Office of Public Interest Counsel (OPIC), Monica Warden and James Carlile (Protestants) as parties to this proceeding.
17. ALJs Ross Henderson and Christiaan Siano conducted a prehearing conference on May 23, 2022. James Bradbury appeared on behalf of Applicant; Jennifer Jamison appeared on behalf of OPIC; Michael Parr appeared on behalf of the ED; Monica Warden appeared on behalf Protestants and James Carlile did not attend.
18. The ALJs granted Applicant's Motion for Summary Disposition as to the following Referred Issues:

ISSUE A: Whether the Draft Permit is protective of water quality, including whether it contains adequate provisions to address stormwater runoff; and

ISSUE C: Whether the Draft Permit is protective of the health of the requester and their family.

19. The hearing on the merits was limited to the sole remaining Referred Issue: whether the Draft Permit adequately prevents nuisance conditions, including odor and flies.
20. Immediately following the prehearing conference, the hearing on the merits was held on May 23, 2022, before ALJs Ross Henderson and Christiaan Siano via videoconference, with the same representatives participating on behalf of their parties. The hearing record closed on June 20, 2022, after replies to the written closing arguments were filed.
21. The administrative record was admitted into evidence.

The Application

22. The Application includes a complete Form TCEQ-00728 Individual Permit Application for a Concentrated Animal Feeding Operation signed by Applicant's authorized representative.
23. The Application was administratively and technically complete and included all necessary supporting information and appropriate TCEQ forms.

Referred Issue A: Whether the Draft Permit is protective of water quality, including whether it contains adequate provisions to address stormwater runoff

24. No party presented evidence rebutting the prima facie demonstration that the proposed Draft Permit is protective of water quality or that it contains adequate provisions to address stormwater runoff.

Referred Issue B: Whether the Draft Permit adequately prevents nuisance conditions, including odor and flies

25. No party rebutted the prima facie demonstration that the proposed Draft Permit adequately prevents nuisance conditions, including odor and flies.
26. Applicant must operate under, update, and implement a Pollution Prevention Plan (PPP) for the dairy CAFO, which must describe and ensure the implementation of practices which are to be used to assure compliance with limitations and conditions of the Draft Permit.
27. Applicant must develop, implement, and operate under a certified Nutrient Management Plan (NMP) and a Comprehensive Nutrient Management Plan (CNMP) certified by the Texas State Soil and Water Conservation Board.
28. Applicant is required to operate the dairy CAFO in such a manner as to prevent nuisance conditions.
29. Applicant implements best management practices (BMPs) at the dairy CAFO that adequately prevent nuisance conditions, including odor and flies.
30. Irrigation practices shall be managed so as to minimize ponding or puddling of wastewater on site, prevent tailwater discharges to water in the state, and prevent the occurrence of nuisance conditions.
31. Applicant must conduct regular visual inspections and equipment testing to determine conditions that could cause breakdowns or failures resulting in discharge of pollutants to water in the state or the creation of a nuisance condition.

Referred Issue C: Whether the Draft Permit is protective of the health of the requester and their family

32. No party presented evidence rebutting the prima facie demonstration that the proposed Draft Permit will not adversely impact the health of the requesters and their families.

Other Remaining Issues

33. With respect to all other contested issues and all uncontested issues, the Application and the remainder of the evidentiary record contain sufficient factual information to satisfy all applicable statutory and regulatory requirements.

Transcript Costs

34. The transcript was required by SOAH Order No. 2 because Applicant's proposed schedule, which was adopted, included a multi-day hearing.
35. The hearing lasted less than one day.
36. Transcript costs cannot be assessed against the ED and OPIC because they are statutory parties who are precluded from appealing the decision of the Commission.
37. Applicant should pay 100% of the transcript costs.

II. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over water quality and CAFOs and the authority to issue a permit under Texas Health and Safety Code, Chapter 382 and Texas Water Code § 5.013.
2. The Application was referred to SOAH pursuant to Texas Water Code § 5.556.
3. SOAH has jurisdiction to conduct a hearing and prepare a proposal for decision in contested cases referred by the Commission under Texas Government Code § 2003.047.
4. Public notice was provided in accordance with Texas Water Code § 5.5553; Texas Health and Safety Code §§ 382.0516, 382.0517, 382.056; Tex. Gov't Code §§ 2001.051, 2001.052; and 30 Tex. Admin. Code, Ch. 39.

5. Applicant properly submitted the Application pursuant to Texas Water Code, Chapter 26 and 30 Texas Administrative Code Ch. 321, Subch. B.
6. This Application was filed on or after September 1, 2015, and is subject to Texas Government Code § 2003.047(i-1) – (i-3).
7. The filing of the Application, the Draft Permit, the preliminary decision issued by the ED, and other supporting documentation in the Administrative Record of the Application established a prima facie demonstration that: (1) the Draft Permit meets all state and federal legal and technical requirements; and (2) the permit, if issued consistent with the Draft Permit, would protect human health and safety, the environment, and physical property. Tex. Gov't Code § 2003.047(i-1); 30 Tex. Admin. Code §§ 80.17(c)(1), 80.117(c)(1), 80.127(h).
8. A party may rebut the prima facie demonstration by presenting evidence that: (1) relates to one of the three referred issues; and (2) demonstrates that one or more provisions in the Draft Permit violate a specifically applicable state or federal requirement. Tex. Gov't Code § 2003.047(i-2); 30 Tex. Admin. Code §§ 80.17(c)(2) and 80.117(c)(3).
9. Protestants failed to present any evidence rebutting the prima facie demonstration as to Referred Issues A and C. The ALJ granted summary disposition as to Referred Issues A and C.
10. Protestants failed to rebut the prima facie demonstration as to Referred Issue B at the hearing on the merits.
11. Applicant has made all demonstrations required under applicable statutes and regulations, including 30 Texas Administrative Code, Ch. 321, Subch. B applicable to CAFO permit applications, to be issued an individual water quality permit as set out in the Draft Permit.
12. Protestants failed to rebut the prima facie demonstration as to all Referred Issues, and the law requires the Draft Permit be approved and issued.
13. The Application for Water Quality Permit No. WQ0003290000 should be granted with the terms contained in the Draft Permit.
14. No transcript costs may be assessed against the ED or OPIC because the TCEQ's rules prohibit the assessment of any cost to a statutory party who is

precluded by law from appealing any ruling, decision, or other act of the Commission. 30 Tex. Admin. Code § 80.23(d)(2).

15. Factors to be considered in assessing transcript costs include: the party who requested the transcript; the financial ability of the party to pay the costs; the extent to which the party participated in the hearing; the relative benefits to the various parties of having a transcript; the budgetary constraints of a state or federal administrative agency participating in the proceeding, and any other factor which is relevant to a just and reasonable assessment of the costs. 30 Tex. Admin. Code § 80.23(d)(1).
16. Considering the factors in 30 Tex. Admin. Code § 80.23(d)(1), a reasonable assessment of hearing transcript costs is 100% of the cost to be paid by Applicant.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The Application by Van Ruiten Dairy Partners for Water Quality Permit No. WQ0003290000 is approved, and the attached permit is issued.
2. Applicant shall pay 100% of the transcription cost.
3. The Commission adopts the Executive Director's Response to Public Comment concerning Applicant's Water Quality Permit No. WQ0003290000 in accordance with 30 Tex. Admin. Code § 50.117. If there is any conflict between the Commission's Order and the Executive Director's Response to Public Comment, the Commission's Order prevails.
4. All other motions, requests for entry of specific Findings of Fact and Conclusions of Law, and any other request for general and specific relief, if not expressly granted herein, are hereby denied for want of merit.
5. The effective date of this Order is the date the Order is final, as provided by Tex. Gov't Code § 2001.144 and 30 Tex. Admin. Code § 80.273.

6. The Chief Clerk of the Commission shall forward a copy of this Order to all parties.
7. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of this Order.

ISSUED:

**TEXAS COMMISSION ON ENVIRONMENTAL
QUALITY**

Jon Niermann, Chairman for the Commission