EXECUTIVE SUMMARY - ENFORCEMENT MATTER

DOCKET NO.: 2010-0144-AGR-E **TCEQ ID:** RN101527893 **CASE NO.:** 39057

RESPONDENT NAME: Nickie Joe Sublett dba Uphill Dairy

ORDER TYPE:		
X 1660 AGREED ORDER	__FINDINGS AGREED ORDER	__FINDINGS ORDER FOLLOWING SOAH HEARING
__FINDINGS DEFAULT ORDER	__SHUTDOWN ORDER	__IMMINENT AND SUBSTANTIAL ENDANGERMENT ORDER
__AMENDED ORDER	__EMERGENCY ORDER	
CASE TYPE:		
__AIR	__MULTI-MEDIA (check all that apply)	__INDUSTRIAL AND HAZARDOUS WASTE
__PUBLIC WATER SUPPLY	__PETROLEUM STORAGE TANKS	__OCCUPATIONAL CERTIFICATION
X WATER QUALITY	__SEWAGE SLUDGE	__UNDERGROUND INJECTION CONTROL
__MUNICIPAL SOLID WASTE	__RADIOACTIVE WASTE	__DRY CLEANER REGISTRATION

SITE WHERE VIOLATION(S) OCCURRED: Uphill Dairy, located on the south side of County Road 219, approximately one mile east of the intersection of County Road 219 and United States Highway 281, Hamilton County

TYPE OF OPERATION: Dairy operation

SMALL BUSINESS: X **Yes** ___ **No**

OTHER SIGNIFICANT MATTERS: There are no complaints. There is no record of additional pending enforcement actions regarding this facility location.

INTERESTED PARTIES: No one other than the ED and the Respondent has expressed an interest in this matter.

COMMENTS RECEIVED: The *Texas Register* comment period expired on June 28, 2010. Comments were received on June 28, 2010 from Ms. Lauren Kalisek, Lloyd Gosselink, Attorneys at Law, 816 Congress Avenue, Suite 1900, Austin, Texas 78701.

CONTACTS AND MAILING LIST:

TCEQ Attorney/SEP Coordinator: None
TCEQ Enforcement Coordinator: Ms. Cheryl Thompson, Enforcement Division, Enforcement Team 3, MC R-04, (817) 588-5886; Ms. Laurie Eaves, Enforcement Division, MC 219, (512) 239-4495
Respondent: Mr. Nickie Joe Sublett, Owner, Uphill Dairy, 910 East Farm-to-Market 219, Hico, Texas 76457
Respondent's Attorney: Not represented by counsel on this enforcement matter

VIOLATION SUMMARY CHART:

VIOLATION INFORMATION	PENALTY CONSIDERATIONS	CORRECTIVE ACTIONS TAKEN/REQUIRED
Type of Investigation: __ Complaint __ Routine __ Enforcement Follow-up X Records Review **Date(s) of Complaints Relating to this Case:** None **Date of Investigation Relating to this Case:** November 3, 2009 **Date of NOE Relating to this Case:** January 8, 2010 **Background Facts:** This was a records review. **WATER** Failure to prevent the unauthorized discharge of wastewater from Land Management Unit No. 3 ("LMU3"). Specifically, the wastewater discharged from the edge of the LMU3 along the borrow ditch on the south side of County Road 219 through a culvert which drained to an adjoining property on the north side of the road. Approximately 41,250 gallons of wastewater was discharged due to a malfunction of the irrigation gun on November 3, 2009 [30 TEX. ADMIN. CODE § 321.40(d), Texas Pollutant Discharge Elimination System ("TPDES") Permit No. WQ0004858000 Part VII, Section A.1.(f), Irrigation Operating Requirements 1 and 2 and TEX. WATER CODE § 26.121].	**Total Assessed:** $2,600 **Total Deferred:** $520 X Expedited Settlement __Financial Inability to Pay **SEP Conditional Offset:** $0 **Total Paid to General Revenue:** $2,080 **Site Compliance History Classification** __ **High** X **Average** __ **Poor** **Person Compliance History Classification** __ **High** X **Average** __ **Poor** **Major Source:** __ Yes X No **Applicable Penalty Policy:** September 2002	**Ordering Provisions:** The Order will require the Respondent to: a. Within 30 days after the effective date of this Agreed Order, develop and implement standard operating procedures and conduct employee training on measures to be taken to prevent the reoccurrence of unauthorized discharges from LMU3; and b. Within 45 days after the effective date of this Agreed Order, submit written certification and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision a.

Additional ID No(s).: TPDES Permit No. WQ0004858000

Lloyd Gosselink
ATTORNEYS AT LAW

816 Congress Avenue, Suite 1900
Austin, Texas 78701
Telephone: (512) 322-5800
Facsimile: (512) 472-0532
www.lglawfirm.com

Ms. Kalisek's Direct Line: (512) 322-5847
E-mail: lkalisek@lglawfirm.com

June 28, 2010

Ms. Cheryl Thompson
Enforcement Coordinator
Texas Commission for Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

VIA FACSIMILE
Fax Number: (512) 239-2550

Re: Comments on Proposed Agreed Order for Nickie Joe Sublet dba Uphill Dairy: Docket No.: 2010-0144-AGR-E (3075-00)

Dear Ms. Thompson:

Please accept these written comments on behalf of the Bosque River Coalition (the "Coalition") concerning the above-referenced Proposed Agreed Order ("AO") for Nickie Joe Sublet dba Uphill Dairy (the "Respondent"). The Coalition is a Texas non-profit corporation formed for the purpose of furthering the protection and enhancement of water quality in the Bosque River watershed. Its membership is comprised of concerned property owners and interests within the watershed. Please feel free to contact me at my law firm, Lloyd Gosselink Rochelle & Townsend, P.C., 816 Congress Avenue, Suite 1900, Austin, Texas 78701, phone number (512) 322-5847, fax number (512) 472-0532, concerning any aspect of these comments.

WRITTEN COMMENTS

The Coalition appreciates Texas Commission on Environmental Quality's ("Commission" or "TCEQ") preparation of the AO and this opportunity to provide comments, and it hereby provides comments to the preparation of the AO and penalty calculation, as follows:

Introduction

The AO contains one violation (the "Violation") – a failure to prevent an unauthorized discharge from Land Management Unit No. 3 to a borrow ditch on the south side of County Road 219 through a culvert which drained to an adjoining property on the north side of the road. The discharge resulted from the malfunction of an irrigation gun, and approximately 41,250 gallons of wastewater was discharged. The Violation was not reported by the Respondent, but was called in by a Coalition member to the TCEQ Stephenville Office. The Executive Director

classifies the Violation as an actual release causing moderate harm in the AO, and the penalty calculation worksheet ("PCW") for the AO indicates that human health or the environment had been exposed to significant amounts of pollutants due to the discharge. The AO assesses a penalty of $2,600 of which $520 is deferred.

This proposed penalty, as discussed in detail below, does not do enough to hold the Respondent accountable for its clear failure to properly manage its facility; nor does it provide enough of an incentive to ensure future compliance. Rather, the Respondent benefits from the fact that its violation was reported by a third party before even more wastewater was discharged from its malfunctioning gun. A more aggressive enforcement approach than is evidenced in this proposed AO should be taken to protect this impaired watershed.

Penalty Calculation

The PCW fails to explain why the Violation should not instead be classified as a "major harm." A "major harm" occurs when "human health or the environment has been exposed to pollutants which **exceed** levels that are protective of human health or environmental receptors."[1] The quantity of wastewater that the Respondent allowed to be discharged of 41,250 gallons clearly negatively impacts water quality and exceeds levels that are protective in a watershed that is already impaired for the very same pollutants contained in Respondent's discharge. The Respondent should be appropriately penalized and held responsible for this impact.

Furthermore, the Violation was reported based on a complaint called in to the TCEQ Stephenville office. The Respondent failed to report the Violation in accordance with the Respondent's TPDES Permit No. WQ0004858000 and 30 TEX. ADMIN. CODE § 321.44(a). Had the Violation not been reported, the quantity of wastewater discharged would have been significantly greater, presumably without any penalty or repercussions to the Respondent. The AO neglects to account for the Respondent's failure to report. The AO should be revised to include this violation as a major programmatic violation.

Based upon the percentage adjustment increase for the Violation for the magnitude of harm to a "major harm," and the additional violation for failure to report, the appropriate penalty that the Respondent should be assessed is at least $4,992.

Conclusion

The Coalition urges the Executive Director to ensure that its penalty calculations and recommendations provide incentive to permittees to achieve and maintain compliance in this impaired watershed. In this situation, a proposed penalty of $2,600 of which $520 is deferred for an unpermitted discharge that would have been worse if not discovered and reported by a Coalition member is frustrating. Such a penalty is not large enough to provide an incentive for compliance, and leaves the burden to Coalition members and other neighboring property owners

[1] TCEQ, *Penalty Policy of the Texas Commission on Environmental Quality* at 6, RG-253, September 2002.

in the watershed to continuously monitor and report violations rather than rely on the TCEQ to impose significant and substantial fines and penalties that will assure compliance.

The Bosque River Coalition hereby requests that the Executive Director consider these comments in evaluating the proposed Agreed Order for Nickie Joe Sublet dba Uphill Dairy. The Coalition appreciates the opportunity to submit these comments and the consideration it hopes the Executive Director and TCEQ staff will give to them.

Sincerely,

Lauren Kalisek

LJK:mab
1171985_5.doc

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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 21, 2010

Ms. Lauren Kalisek
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701

Re: Comments Received from Bosque River Coalition
Regarding Proposed Agreed Enforcement Order
Nickie Joe Sublett dba Uphill Dairy
RN101527893; Docket No. 2010-0144-AGR-E; Enforcement Case No. 39057

Dear Ms. Kalisek:

On June 28, 2010, we received your letter, sent on behalf of the Bosque River Coalition, concerning the proposed agreed enforcement order for Nickie Joe Sublett dba Uphill Dairy ("the Respondent") in Hamilton, County, Texas. Your letter has been forwarded to our General Counsel's Office to be considered by the Commission when this case is taken up at Agenda. We would like to take this opportunity to respond to some of your comments.

Classification of the Penalty
You assert in your letter that the violation in the Agreed order should have been classified as a "major harm" when "human health or the environment has been exposed to pollutants that exceed levels that are protective of human health or environmental receptors". In this case, there is no documentation of significant harm to human health, property or the environment. Therefore "moderate harm" is appropriate for this violation.

Reporting Violation
You also assert in your letter that the Respondent failed to report the unauthorized discharge and that the Agreed Order should be revised to include a failure to report the violation. Both, TPDES Permit No. WQ0004858000 and 30 TEX. ADMIN. CODE ch. 321, require that the appropriate regional office be orally notified of a discharge to water in the state within one hour of discovery if possible, but no later than 24 hours from the date the discharged occurred. Written notification is required no later than 14 working days of the discovery. In this case, the TCEQ Stephenville Office responded to the complaint regarding the unauthorized discharge within two hours of receipt. The regional office was made aware of the discharge before the Respondent became aware of the discharge. During the investigation the Respondent was informed of the discharge and orally discussed the discharge with the investigator. The Respondent also submitted written notice within 14 days of the discharge. Due to these circumstances, it was determined that a reporting violation is not appropriate.

TCEQ appreciates the input of the Bosque River Coalition regarding this pending enforcement matter. The Bosque River Coalition has been added to the mailing list to receive a copy of the final order issued by the Commissions in this matter. Ms. Cheryl Thompson, is the Enforcement

Coordinator assigned to this case. If you have further concerns or comments related to the order, please do not hesitate to call Ms. Thompson at (817) 588-5886. For complaints related to the Respondent's current operating conditions or procedures, you should continue to contact our Stephenville Regional Office at (254) 965-9200.

Sincerely,

Bryan Sinclair, Director
Enforcement Division
Texas Commission on Environmental Quality

BS/ct

cc: Mr. Sid Slocum, Manager, Water Section, Dallas/Fort Worth Regional Office, TCEQ

Texas Commission on Environmental Quality
INTEROFFICE MEMORANDUM

To: Bryan W. Shaw, Ph.D., Chairman
Carlos Rubinstein, Commissioner
Buddy Garcia, Commissioner
Les Trobman, General Counsel

Date: December 21, 2010

Thru: BS Bryan Sinclair, Director, Enforcement Division

From: Susan Johnson, Manager, Enforcement Division

Subject: Response to Comment Received Concerning Proposed Agreed Enforcement Order, Nickie Joe Sublett dba Uphill Dairy, Hamilton County
RN101527893, Enforcement Case No. 39057, Docket No. 2010-0144-AGR-E

In response to a publication in the *Texas Register* on May 28, 2010, one comment has been received regarding a proposed agreed enforcement order requiring certain actions of. The comment was received within the thirty-day public comment period.

The proposed order addresses a violation of 30 TEX. ADMIN. CODE § 321.40(d), Texas Pollutant Discharge Elimination System ("TPDES") Permit No. WQ0004858000 Part VII, Section A.1.(f), Irrigation Operating Requirements 1 and 2 and TEX. WATER CODE § 26.121 for failing to prevent the unauthorized discharge of wastewater from Land Management Unit No. 3 ("LMU3"). Specifically, the wastewater discharged from the edge of the LMU3 along the borrow ditch on the south side of County Road 219 through a culvert which drained to an adjoining property on the north side of the road. Approximately 41,250 gallons of wastewater was discharged due to a malfunction of the irrigation gun on November 3, 2009. The violation was documented on November 3, 2009. TCEQ staff and Nickie Joe Sublett dba Uphill Dairy agreed on the terms of the proposed order on April 23, 2010. The order would assess a Two Thousand Six Hundred Dollar ($2,600) penalty of which Five Hundred Twenty Dollar ($520) is deferred in accordance with the expedited order process.

A copy of the comment, and the staff response to the comment, are attached for your consideration. In summary, the commentor is expressing concerns regarding the preparation of the appropriateness of the assessed penalty. Staff's position, as reflected in the response, is that the appropriate Agreed Order was proposed and that the proposed penalty was appropriately calculated. Accordingly, the Enforcement Division recommends that you adopt this proposed order.

Attachments: Commentor's Letter Dated June 28, 2010, Staff's Response Letter

cc: Sid Slocum, Manager, Water Section, Dallas/Fort Worth Regional Office
Cheryl Thompson, Enforcement Coordinator, Enforcement Division
Central Records, MC 213, Building E, 1st Floor, TPDES Permit No. WQ0004858000
Enforcement Division Reader File

Penalty Calculation Worksheet (PCW)

Policy Revision 2 (September 2002) — *PCW Revision October 30, 2008*

TCEQ

DATES						
Assigned	11-Jan-2010					
PCW	25-Jan-2010	**Screening**	19-Jan-2010	**EPA Due**		

RESPONDENT/FACILITY INFORMATION

Respondent	Nickie Joe Sublett dba Uphill Dairy		
Reg. Ent. Ref. No.	RN101527893		
Facility/Site Region	4-Dallas/Fort Worth	**Major/Minor Source**	Minor

CASE INFORMATION

Enf./Case ID No.	39057	**No. of Violations**	1
Docket No.	2010-0144-AGR-E	**Order Type**	1660
Media Program(s)	Water Quality	**Government/Non-Profit**	No
Multi-Media		**Enf. Coordinator**	Cheryl Thompson
		EC's Team	Enforcement Team 3

Admin. Penalty $ Limit Minimum $0 Maximum $10,000

Penalty Calculation Section

TOTAL BASE PENALTY (Sum of violation base penalties) — *Subtotal 1*: $2,500

ADJUSTMENTS (+/-) TO SUBTOTAL 1

Subtotals 2-7 are obtained by multiplying the Total Base Penalty (Subtotal 1) by the indicated percentage.

Compliance History — 4.0% Enhancement — *Subtotals 2, 3, & 7*: $100

Notes: The Respondent received two NOVs for non-similar violations.

Culpability — No — 0.0% Enhancement — *Subtotal 4*: $0

Notes: The Respondent does not meet the culpability criteria.

Good Faith Effort to Comply Total Adjustments — *Subtotal 5*: $0

Economic Benefit — 0.0% Enhancement* — *Subtotal 6*: $0

Total EB Amounts: $36
Approx. Cost of Compliance: $800

**Capped at the Total EB $ Amount*

SUM OF SUBTOTALS 1-7 — *Final Subtotal*: $2,600

OTHER FACTORS AS JUSTICE MAY REQUIRE — 0.0% — *Adjustment*: $0

Reduces or enhances the Final Subtotal by the indicated percentage.

Notes:

Final Penalty Amount: $2,600

STATUTORY LIMIT ADJUSTMENT — *Final Assessed Penalty*: $2,600

DEFERRAL — 20.0% Reduction — *Adjustment*: -$520

Reduces the Final Assessed Penalty by the indicted percentage. *(Enter number only; e.g. 20 for 20% reduction.)*

Notes: Deferral offered for expedited settlement.

PAYABLE PENALTY: $2,080

Screening Date 19-Jan-2010 **Docket No.** 2010-0144-AGR-E **PCW**

Respondent Nickie Joe Sublett dba Uphill Dairy

Policy Revision 2 (September 2002)

Case ID No. 39057

PCW Revision October 30, 2008

Reg. Ent. Reference No. RN101527893

Media [Statute] Water Quality

Enf. Coordinator Cheryl Thompson

Compliance History Worksheet

>> Compliance History *Site* Enhancement (Subtotal 2)

Component	Number of...	Enter Number Here	Adjust.
NOVs	Written NOVs with same or similar violations as those in the current enforcement action (*number of NOVs meeting criteria*)	0	0%
	Other written NOVs	2	4%
Orders	Any agreed final enforcement orders containing a denial of liability (*number of orders meeting criteria*)	0	0%
	Any adjudicated final enforcement orders, agreed final enforcement orders without a denial of liability, or default orders of this state or the federal government, or any final prohibitory emergency orders issued by the commission	0	0%
Judgments and Consent Decrees	Any non-adjudicated final court judgments or consent decrees containing a denial of liability of this state or the federal government (*number of judgements or consent decrees meeting criteria*)	0	0%
	Any adjudicated final court judgments and default judgments, or non-adjudicated final court judgments or consent decrees without a denial of liability, of this state or the federal government	0	0%
Convictions	Any criminal convictions of this state or the federal government (*number of counts*)	0	0%
Emissions	Chronic excessive emissions events (*number of events*)	0	0%
Audits	Letters notifying the executive director of an intended audit conducted under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 *(number of audits for which notices were submitted)*	0	0%
	Disclosures of violations under the Texas Environmental, Health, and Safety Audit Privilege Act, 74th Legislature, 1995 (*number of audits for which violations were disclosed*)	0	0%

		Please Enter Yes or No	
Other	Environmental management systems in place for one year or more	No	0%
	Voluntary on-site compliance assessments conducted by the executive director under a special assistance program	No	0%
	Participation in a voluntary pollution reduction program	No	0%
	Early compliance with, or offer of a product that meets future state or federal government environmental requirements	No	0%

Adjustment Percentage (Subtotal 2) 4%

>> Repeat Violator (Subtotal 3)

No

Adjustment Percentage (Subtotal 3) 0%

>> Compliance History Person Classification (Subtotal 7)

Average Performer

Adjustment Percentage (Subtotal 7) 0%

>> Compliance History Summary

Compliance History Notes

The Respondent received two NOVs for non-similar violations.

Total Adjustment Percentage (Subtotals 2, 3, & 7) 4%

Screening Date 19-Jan-2010 **Docket No.** 2010-0144-AGR-E **PCW**

Respondent Nickie Joe Sublett dba Uphill Dairy *Policy Revision 2 (September 2002)*

Case ID No. 39057 *PCW Revision October 30, 2008*

Reg. Ent. Reference No. RN101527893

Media [Statute] Water Quality

Enf. Coordinator Cheryl Thompson

Violation Number 1

Rule Cite(s) 30 Tex. Admin. Code § 321.40(d); Texas Pollutant Discharge Elimination System ("TPDES") Permit No. WQ0004858000 Part VII, Section A.1.(f), Irrigation Operating Requirements 1 and 2 and Tex. Water Code § 26.121

Violation Description Failed to prevent the unauthorized discharge of wastewater from Land Management Unit No. 3 ("LMU3"). Specifically, the wastewater discharged from the edge of the LMU3 along the borrow ditch on the south side of County Road 219 through a culvert which drained to an adjoining property on the north side of the road. Approximately 41,250 gallons of wastewater was discharged due to a malfunction of the irrigation gun on November 3, 2009.

Base Penalty $10,000

>> Environmental, Property and Human Health Matrix

OR	Release	Harm: Major	Moderate	Minor
	Actual		x	
	Potential			

Percent 25%

>>Programmatic Matrix

Falsification	Major	Moderate	Minor

Percent 0%

Matrix Notes: Human health or the environment has been exposed to significant amounts of pollutants as a result of this violation.

Adjustment $7,500

$2,500

Violation Events

Number of Violation Events: 1 — 1 Number of violation days

mark only one with an x

daily	
weekly	
monthly	x
quarterly	
semiannual	
annual	
single event	

Violation Base Penalty $2,500

One monthly event is recommended for the discharge that occurred on November 3, 2009.

Good Faith Efforts to Comply

0.0% Reduction — $0

	Before NOV	NOV to EDPRP/Settlement Offer
Extraordinary		
Ordinary		
N/A	x	(mark with x)

Notes: The Respondent does not meet the good faith criteria for this violation.

Violation Subtotal $2,500

Economic Benefit (EB) for this violation

Estimated EB Amount $36

Statutory Limit Test

Violation Final Penalty Total $2,600

This violation Final Assessed Penalty (adjusted for limits) $2,600

Economic Benefit Worksheet

Respondent Nickie Joe Sublett dba Uphill Dairy
Case ID No. 39057
Reg. Ent. Reference No. RN101527893
Media Water Quality
Violation No. 1

Percent Interest	Years of Depreciation
5.0	15

Item Description (No commas or $)	Item Cost	Date Required	Final Date	Yrs	Interest Saved	Onetime Costs	EB Amount
Delayed Costs							
Equipment				0.00	$0	$0	$0
Buildings				0.00	$0	$0	$0
Other (as needed)				0.00	$0	$0	$0
Engineering/construction				0.00	$0	$0	$0
Land				0.00	$0	n/a	$0
Record Keeping System				0.00	$0	n/a	$0
Training/Sampling	$300	3-Nov-2009	30-Sep-2010	0.91	$14	n/a	$14
Remediation/Disposal				0.00	$0	n/a	$0
Permit Costs				0.00	$0	n/a	$0
Other (as needed)	$500	3-Nov-2009	30-Sep-2010	0.91	$23	n/a	$23
Notes for DELAYED costs	Estimated cost to develop and implement standard operating procedures and conduct employee training to prevent similar unauthorized discharges. Date required is the discharge date. The Final date is the projected date of compliance.						
Avoided Costs	ANNUALIZE [1] avoided costs before entering item (except for one-time avoided costs)						
Disposal				0.00	$0	$0	$0
Personnel				0.00	$0	$0	$0
Inspection/Reporting/Sampling				0.00	$0	$0	$0
Supplies/equipment				0.00	$0	$0	$0
Financial Assurance [2]				0.00	$0	$0	$0
ONE-TIME avoided costs [3]				0.00	$0	$0	$0
Other (as needed)				0.00	$0	$0	$0
Notes for AVOIDED costs							

Approx. Cost of Compliance	$800	TOTAL	$36

Compliance History Report

Customer/Respondent/Owner-Operator:	CN601616592	SUBLETT, NICKIE JOE	Classification: AVERAGE	Rating: 3.91
Regulated Entity:	RN101527893	UPHILL DAIRY	Classification: AVERAGE	Site Rating: 0.33

ID Number(s):

WASTEWATER AGRICULTURE	EPA ID	TX0129755
WASTEWATER AGRICULTURE	PERMIT	WQ0004858000

Location: south side of County Road 219 approximately one mile east of the intersection of County Road 219 and United States Highway 281 Hamilton County, Texas

TCEQ Region: REGION 09 - WACO

Date Compliance History Prepared: January 20, 2010

Agency Decision Requiring Compliance History: Enforcement

Compliance Period: January 20, 2005 to January 20, 2010

TCEQ Staff Member to Contact for Additional Information Regarding this Compliance History

Name: Cheryl Thompson Phone: (817) 588-5886

Site Compliance History Components

1. Has the site been in existence and/or operation for the full five year compliance period? No
2. Has there been a (known) change in ownership/operator of the site during the compliance period? Yes
3. If Yes, who is the current owner/operator? SUBLETT, NICKIE JOE
4. if Yes, who was/were the prior owner(s)/operator(s) ?

OWN	FINNERTY, KEVIN
OWN	VOLLEMAN, CARL
OWNOPR	Finnerty Kevin and Volleman Carl

5. When did the change(s) in owner or operator occur? 11/04/2005
6. Rating Date: 9/1/2009 Repeat Violator: NO

Components (Multimedia) for the Site :

A. Final Enforcement Orders, court judgements, and consent decrees of the state of Texas and the federal government.

N/A

B. Any criminal convictions of the state of Texas and the federal government.

N/A

C. Chronic excessive emissions events.

N/A

D. The approval dates of investigations. (CCEDS Inv. Track. No.)

1	07/27/2005	(401977)
2	08/14/2006	(484201)
3	06/28/2007	(563219)
4	05/13/2008	(641108)
5	11/20/2008	(705752)
6	11/23/2009	(779499)

E. Written notices of violations (NOV). (CCEDS Inv. Track. No.)

Date: 08/11/2006 (484201) CN601616592

Self NO Classification: Minor

Citation: 30 TAC Chapter 321, SubChapter B 321.34(b)(3)

Description: Failure of the permittee to notify the appropriate TCEQ regional office at least 48 hours prior to any change in the number or configuration of LMUs. TXG920000 Part IV.B(2)(b)

Self NO Classification: Minor

Citation: 30 TAC Chapter 321, SubChapter B 321.34(f)(3)(A)(i)

Description: Failure of the recharge feature documentation to include proof of an on-site inspection and review of all pertinent records and maps to locate any artificial recharge features. TXG920000 Part III.A.3(B)

Date 11/24/2009 (779499) CN601616592

Self Report? NO Classification: Minor

Citation: 30 TAC Chapter 321, SubChapter B 321.42(k)
WQ0004858000/Part VII.A.9.(b)(2) OP

Description: Failure to collect one or more representative composite soil samples from each LMU including any historical waste application fields, not less than once every 12 months. 321.42(k)

F. Environmental audits.

G. Type of environmental management systems (EMSs).

N/A

H. Voluntary on-site compliance assessment dates.

N/A

I. Participation in a voluntary pollution reduction program.

N/A

J. Early compliance.

N/A

Sites Outside of Texas

N/A

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

IN THE MATTER OF AN ENFORCEMENT ACTION CONCERNING NICKIE JOE SUBLETT DBA UPHILL DAIRY RN101527893	§	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

AGREED ORDER
DOCKET NO. 2010-0144-AGR-E

I. JURISDICTION AND STIPULATIONS

At its _____ agenda, the Texas Commission on Environmental Quality ("the Commission" or "TCEQ") considered this agreement of the parties, resolving an enforcement action regarding Nickie Joe Sublett dba Uphill Dairy ("the Respondent") under the authority of TEX. WATER CODE chs. 7 and 26. The Executive Director of the TCEQ, through the Enforcement Division, and the Respondent appear before the Commission and together stipulate that:

1. The Respondent owns and operates a dairy located on the south side of County Road 219, approximately one mile east of the intersection of County Road 219 and United States Highway 281 in Hamilton County, Texas (the "Facility").

2. The Respondent has caused, suffered, allowed or permitted the discharge of any waste or the performance of any activity in violation of TEX. WATER CODE ch. 26 or any rule, permit, or order of the Commission.

3. The Commission and the Respondent agree that the Commission has jurisdiction to enter this Agreed Order, and that the Respondent is subject to the Commission's jurisdiction.

4. The Respondent received notice of the violations alleged in Section II ("Allegations") on or about January 13, 2010.

5. The occurrence of any violation is in dispute and the entry of this Agreed Order shall not constitute an admission by the Respondent of any violation alleged in Section II ("Allegations"), nor of any statute or rule.

6. An administrative penalty in the amount of Two Thousand Six Hundred Dollars ($2,600) is assessed by the Commission in settlement of the violations alleged in Section II ("Allegations"). The Respondent has paid Two Thousand Eighty Dollars ($2,080) of the administrative penalty and Five Hundred Twenty Dollars ($520) is deferred contingent upon the Respondent's timely and satisfactory compliance with all the terms of this Agreed Order. The deferred amount will be waived upon full compliance with the terms of this Agreed Order. If the Respondent fails to timely and satisfactorily comply with all requirements of this Agreed Order, the Executive Director may require the Respondent to pay all or part of the deferred penalty.

7. Any notice and procedures, which might otherwise be authorized or required in this action, are waived in the interest of a more timely resolution of the matter.

8. The Executive Director of the TCEQ and the Respondent have agreed on a settlement of the matters alleged in this enforcement action, subject to the approval of the Commission.

9. The Executive Director may, without further notice or hearing, refer this matter to the Office of the Attorney General of the State of Texas ("OAG") for further enforcement proceedings if the Executive Director determines that the Respondent has not complied with one or more of the terms or conditions in this Agreed Order.

10. This Agreed Order shall terminate five years from its effective date or upon compliance with all the terms and conditions set forth in this Agreed Order, whichever is later.

11. The provisions of this Agreed Order are deemed severable and, if a court of competent jurisdiction or other appropriate authority deems any provision of this Agreed Order unenforceable, the remaining provisions shall be valid and enforceable.

II. ALLEGATIONS

As owner and operator of the Facility, the Respondent is alleged to have failed to prevent the unauthorized discharge of wastewater from Land Management Unit No. 3 ("LMU3"), in violation of 30 TEX. ADMIN. CODE § 321.40(d), Texas Pollutant Discharge Elimination System ("TPDES") Permit No. WQ0004858000 Part VII, Section A.1.(f), Irrigation Operating Requirements 1 and 2 and TEX. WATER CODE § 26.121, as documented during an investigation conducted on November 3, 2009. Specifically, the wastewater discharged from the edge of the LMU3 along the borrow ditch on the south side of County Road 219 through a culvert which drained to an adjoining property on the north side of the road. Approximately 41,250 gallons of wastewater was discharged due to a malfunction of the irrigation gun on November 3, 2009.

III. DENIALS

The Respondent generally denies each allegation in Section II ("Allegations").

IV. ORDERING PROVISIONS

1. It is, therefore, ordered by the TCEQ that the Respondent pay an administrative penalty as set forth in Section I, Paragraph 6 above. The payment of this administrative penalty and the Respondent's compliance with all the terms and conditions set forth in this Agreed Order resolve only the allegations in Section II. The Commission shall not be constrained in any manner from requiring corrective action or penalties for violations which are not raised here. Administrative penalty payments shall be made payable to "TCEQ" and shall be sent with the notation "Re: Nickie Joe Sublett dba Uphill Dairy, Docket No. 2010-0144-AGR-E" to:

Financial Administration Division, Revenues Section
Attention: Cashier's Office, MC 214
Texas Commission on Environmental Quality
P.O. Box 13088
Austin, Texas 78711-3088

2. It is further ordered that the Respondent shall undertake the following technical requirements:

a. Within 30 days after the effective date of this Agreed Order, develop and implement standard operating procedures and conduct employee training on measures to be taken to prevent the reoccurrence of unauthorized discharges from LMU3; and

b. Within 45 days after the effective date of this Agreed Order, submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision No. 2.a. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

> "I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations."

The certification shall be submitted to:

Order Compliance Team
Enforcement Division, MC 149A
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

with a copy to:

Water Section, Manager
Dallas/Fort Worth Regional Office
Texas Commission on Environmental Quality
2309 Gravel Drive
Fort Worth, Texas 76118-6951

3. The provisions of this Agreed Order shall apply to and be binding upon the Respondent. The Respondent is ordered to give notice of the Agreed Order to personnel who maintain day-to-day control over the Facility operations referenced in this Agreed Order.

4. If the Respondent fails to comply with any of the Ordering Provisions in this Agreed Order within the prescribed schedules, and that failure is caused solely by an act of God, war, strike, riot, or other catastrophe, the Respondent's failure to comply is not a violation of this Agreed Order. The Respondent shall have the burden of establishing to the Executive Director's satisfaction that such an event has occurred. The Respondent shall notify the Executive Director within seven days after the Respondent becomes aware of a delaying event and shall take all reasonable measures to mitigate and minimize any delay.

5. The Executive Director may grant an extension of any deadline in this Agreed Order or in any plan, report, or other document submitted pursuant to this Agreed Order, upon a written and substantiated showing of good cause. All requests for extensions by the Respondent shall be made in writing to the Executive Director. Extensions are not effective until the Respondent receives written approval from the Executive Director. The determination of what constitutes good cause rests solely with the Executive Director.

6. This Agreed Order, issued by the Commission, shall not be admissible against the Respondent in a civil proceeding, unless the proceeding is brought by the OAG to: (1) enforce the terms of this Agreed Order; or (2) pursue violations of a statute within the Commission's jurisdiction, or of a rule adopted or an order or permit issued by the Commission under such a statute.

7. This Agreed Order may be executed in multiple counterparts, which together shall constitute a single original instrument. Any executed signature page to this Agreed Order may be transmitted by facsimile transmission to the other parties, which shall constitute an original signature for all purposes under this Agreed Order.

8. Under 30 TEX. ADMIN. CODE § 70.10(b), the effective date is the date of hand-delivery of the Order to the Respondent, or three days after the date on which the Commission mails notice of the Order to the Respondent, whichever is earlier. The Chief Clerk shall provide a copy of this Agreed Order to each of the parties.

SIGNATURE PAGE

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

_____
For the Commission

_____ _____
For the Executive Director Date 6/10/2010

I, the undersigned, have read and understand the attached Agreed Order. I am authorized to agree to the attached Agreed Order on behalf of the entity indicated below my signature, and I do agree to the terms and conditions specified therein. I further acknowledge that the TCEQ, in accepting payment for the penalty amount, is materially relying on such representation.

I also understand that failure to comply with the Ordering Provisions, if any, in this order and/or failure to timely pay the penalty amount, may result in:

- A negative impact on compliance history;
- Greater scrutiny of any permit applications submitted;
- Referral of this case to the Attorney General's Office for contempt, injunctive relief, additional penalties, and/or attorney fees, or to a collection agency;
- Increased penalties in any future enforcement actions;
- Automatic referral to the Attorney General's Office of any future enforcement actions; and
- TCEQ seeking other relief as authorized by law.

In addition, any falsification of any compliance documents may result in criminal prosecution.

_____ _____
Signature Date 4-21-10

Nickie Joe Sublett _____
Name (Printed or typed) Title Owner
Authorized Representative of
Nickie Joe Sublett dba Uphill Dairy

Instructions: Send the original, signed Agreed Order with penalty payment to the Financial Administration Division, Revenues Section at the address in Section IV, Paragraph 1 of this Agreed Order.

04-23-10 RCVD 1664