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Blas J. Coy, Jr., *Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 4, 2008

LaDonna Castañuela, Chief Clerk  
Texas Commission on Environmental Quality  
Office of the Chief Clerk (MC-105)  
P.O. Box 13087  
Austin, Texas 78711-3087

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 JAN -4 PM 3:34  
CHIEF CLERKS OFFICE

RE: **O-KEE DAIRY**  
**TCEQ DOCKET NO. 2007-1496-AGR**

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in cursive script that reads "Christina Mann".

Christina Mann, Attorney  
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

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printed on recycled paper using soy-based ink

TCEQ DOCKET NO. 2007-1496-AGR

IN THE MATTER OF  
THE APPLICATION  
FOR A MAJOR  
AMENDMENT BY  
JEWEL ALT AND OENE  
KEUNING DBA O-KEE  
DAIRY TO WATER  
QUALITY PERMIT NO.  
WQ000410800

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BEFORE THE TEXAS  
COMMISSION ON  
ENVIRONMENTAL  
QUALITY

2008 JAN -4 PM 3:34  
CHIEF CLERK'S OFFICE

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO REQUEST FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) and files this Response to Request for Hearing in the above-referenced matter.

**I. INTRODUCTION**

Jewel Alt and Oene Keuning, dba O-Kee Dairy (Applicant) have applied to TCEQ for a major amendment of existing Concentrated Animal Feeding Operation (CAFO) Texas Pollutant Discharge Elimination System (TPDES) permit no. WQ0004108000. The major amendment to the CAFO individual permit would allow Applicant to expand its dairy head capacity from 690 to 999 total head. The facility consists of two retention control structures (RCSs) and six land management units (LMUs). The facility is located at 4745 County Road 207, Hico, Texas 76457 in Hamilton County and is located in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River Basin.

The application was received on January 24, 2006 and declared administratively complete on September 14, 2006. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit Amendment (NORI) was published in the *Hamilton Herald-News* on September 28, 2006. The Executive Director completed the technical review of the application and prepared a draft permit and the Notice of Application and Preliminary Decision (NAPD) was published in the *Hamilton Herald-News* on January 4, 2007. A public meeting was held on April 19, 2007 in Pottsville, Texas and the public comment period ended at the end of the public meeting. The chief clerk of the TCEQ mailed the Decision of the Executive Director and the Executive Director's Response to Comments (RTC) on August 16, 2007.

The TCEQ received a timely hearing request from the City of Waco on September 17, 2007.

## II. ANALYSIS

### A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code § 5.556 added by Acts 1999, 76<sup>th</sup> Leg., ch 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not

common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TEXAS ADMINISTRATIVE CODE (TAC) § 55.201(d). Under 30 TAC § 55.203(a), an affected person is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

The Commission shall grant an affected person’s timely filed hearing request if:

- (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission’s decision on the application. 30 TAC §55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;

- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

**B. Determination of Affected Person Status**

The Office of the Chief Clerk received a hearing request from the City of Waco (Waco or the City). Waco acknowledges it is approximately 80 river miles downstream from the Applicant's dairy, but demonstrates that it is an "affected person" by detailing how the City will be adversely affected by the proposed CAFO activities. Waco states that Lake Waco is directly impacted by the activities of the Applicant. The Applicant's dairy produces runoff which spills into the North Bosque River and Lake Waco is the final receiving waters for the North Bosque. Waco attaches a detailed expert report setting out the numerous impacts of dairy runoff in the North Bosque watershed on Lake Waco. Waco further states that allowing an increase in herd size from 690 to 999 cows will increase the amount of phosphorous and pathogens in Lake Waco, likely causing algal blooms and taste and odor problems in the water of Lake Waco. Finally, according to Waco, the distance between the dairy and Lake Waco does not reduce the impact as expected, because the heavy rainstorms which wash the pollutants from the dairy fields into the North Bosque ensure that the pollutants make it all the way to Lake Waco in 3 to 5 days.

OPIC finds that the City of Waco has demonstrated that it is an "affected person" as determined by 30 TAC § 55.203(c). Waco owns all the water rights in Lake Waco for

municipal uses, including public consumption. The City of Waco provides the water of Lake Waco for recreation and consumption to its citizens as part of its municipal duties. Waco has provided extensive documentation in its hearing request that pollution from the Applicant's operations will likely impact the water quality of Lake Waco and therefore the water rights owned by Waco. OPIC finds that this concern is protected by the law under which the application will be considered. There are no distance limitations imposed by law on the interest. Waco's attached expert report explains why the relationship between the interest claimed and the activity regulated is reasonable and why Waco can reasonably claim there is a likely impact of the dairy operation on the water quality of Lake Waco, even given the distance between the regulated activity and Lake Waco. And finally, Waco is a governmental entity<sup>1</sup> with specific obligations to its citizens to provide clean drinking water and recreational areas. For these reasons, Waco is an affected person.

### **C. Issues Raised in the Hearing Requests**

Waco raises the following disputed issues in its hearing request:

1. Should TCEQ have processed the expansion and original construction of the facility as a "new source" as defined by 40 CFR §122.2? Were there fact issues relevant to the "new source" determination that have not been considered?
2. Has the applicant made a demonstration that there are sufficient remaining load allocations in the North Bosque River to allow for discharges from the expansion of this dairy or that existing dischargers were subject to compliance schedules as required by 40 CFR §122.4 (i)?
3. Will the issuance of the proposed permit be inconsistent with the following assumptions made in the TMDL for phosphorus inputs into the North Bosque River:

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<sup>1</sup> The City of Waco has the authority to protect public health. Section 121.003(a) of the Health and Safety Code provides that "[t]he governing body of a municipality or the commissioners court of a county may enforce any law that is reasonably necessary to protect the public health." In addition, Texas Water Code Chapter 26, Subchapter E details the statutory authority a local government has over water quality issues.

- A) 40,450 dairy cows in the watershed;
  - B) 50% of solid manure from 40,450 dairy cows would be removed from the watershed;
  - C) Phosphorus in the diet of permitted cows would be limited to 0.4%;
  - D) Waste application on existing fields would be limited so that phosphorus never exceeds 200 parts per million (ppm);
  - E) Waste application rates would be limited to the agronomic rates of the crop; and
  - F) Initial phosphorus on new fields would be 60 ppm and could not exceed that level.
4. Will allowing the use of third party fields in the draft permit act as a disincentive to transport waste to a compost facility or out of the watershed to the detriment of the water quality standards?
  5. Has the ED provided adequate technical justification that the measures recited in the draft permit will meet the water quality standards for phosphorus and actually attain the reductions in phosphorus loading set forth in the TMDL and TMDL-I Plan for the North Bosque River?
  6. Does the permit adequately consider the factors specified in 40 CFR §125.3(d)(2) and Clean Water Act §304 (b)(4)(B)?
  7. Will the Applicant, through its contracts regarding the use of third party fields, in effect, control those fields, requiring the fields to be considered land management units (LMUs)?
  8. Must TCEQ evaluate the following plans prior to permitting and make them available to the public throughout the public comment period: Comprehensive Nutrient Management Plans (CNMPs), Nutrient Utilization Plans (NUPs), Retention Control Structure (RCS) management plans, and pollution prevention plans (PPPs)?
  9. Is the amount of phosphorous being produced versus what is being hauled out and or land applied properly accounted for in the draft permit?
  10. Has the permit adequately taken into account the organic phosphorous application rates which would occur at maximum solids application rates, rather than planned application rates?
  11. Does the change made by the ED in the draft permit related to the Nutrient Management Plan (NMP) for LMU #6 require new notice and a new 30-day comment period?
  12. Would it be more accurate for the NMP include data related to the application of solids from the settling basin since such solids will likely be applied to LMUs?
  13. Is the water balance in the permit application used to calculate runoff amounts appropriate?
  14. Is the methodology for calculating agronomic rates accurate?
  15. Does the change to Section VII.A.8.(a) of the draft permit require new notice and 30-day comment period?
  16. Would it be more accurate for the sludge volume in the lagoons to be monitored prior to permit issuance since the facility has been in operation for many years?

17. Should more frequent samples be required since single samples are not representative for evaluating the characteristics of the wastewater and are likely to underestimate the concentrations of phosphorus?
18. Should the permit require at least 50% of the collectible manure to be removed from the watershed in order to comport with the modeling conducted for the TMDL for the North Bosque River?
19. Does applying waste to fields with excesses of 200 parts per million (ppm) of phosphorous ensure “beneficial use” as required by TCEQ rules when 200 ppm is over seven times the amount of phosphorous needed to achieve optimal growth of proposed crops?
20. Should the phrase “not exceed the nitrogen application rate” at paragraph VII.A.8(e)(4)(i)(C) of the draft permit be replaced with “not to exceed the nitrogen crop removal rate?”
21. Should the ED revise the provisions applicable to third party fields at paragraphs VII.A.8(e)(5)(i)(D) and (E) to make it clear that the application rate cannot exceed the annual nitrogen crop removal rate where that value is more restrictive? Specifically, should language be added to those sections to make it clear when the requirements of Natural Resources Conservation Service (NRCS) Code 590 are more strict than the requirements in VII.A.8(e)(5)(i)(C)-(E), then NRCS Code 590 should apply?
22. Should Nutrient Utilization Plans (NUPs) (when soil phosphorus exceeds 200 ppm) and NMPs be required for each third party fields and submitted and reviewed during the permit application process? If application rates are based upon soil test phosphorous levels in third party fields, can the ED or Applicant determine the appropriate amount of waste that can be applied without an NMP for that field?
23. Can the phosphorus crop removal rates be accurately calculated and compliance with the phosphorus application rate limitations be determined without records of crops and crop yields? Should section VII.8(e)(5) of the draft permit be revised to include a requirement that records of crops and crop yields be submitted to TCEQ?
24. Should an NMP be prepared so that it shows the impact of all nutrient management issues over the five year term and whether the operation is sustainable?
25. Should TCEQ should include a definition for “vegetative buffers” in the permit or require that they meet the same standard as “filter strips” in NRCS Code 393?
26. Are the table and map in Section X.F of the draft permit ambiguous and therefore unenforceable?
27. Is the draft permit adequately clear where the measurement of the vegetative buffers and filter strips begin in relation to the stream bed to allow adequate enforcement?

**D. Issues raised in Comment Period**

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§55.201(c) and (d)(4), 55.211(c)(2)(A).

**E. Disputed Issues**

There is no agreement between Waco and the Applicant or Executive Director on the issues raised in the hearing requests.

**F. Issues of Fact**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. The City of Waco notes in its hearing request for each issue whether it believes the issue to be one of law, fact, or both. The City of Waco acknowledges the following issues as listed above to be solely issues of law: Issues 7, 8, 11, 15, 20, and 21. OPIC would therefore recommend that these issues are not appropriate for referral to hearing. OPIC agrees with Waco that each of the remaining issues is a disputed factual issue. See 30 TAC §55.211(b)(3)(A) and (B)

**G. Relevant and Material Issues**

The hearing request raises issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.<sup>2</sup> Relevant and material issues are those that are governed by the substantive law under which this permit

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<sup>2</sup> See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

is to be issued.<sup>3</sup> All of the issues are relevant and material to the Commission's consideration of the application. Each issue raises very specific questions about the draft permit itself and ultimately questions whether the permit is adequately protective of surface water quality in the North Bosque River. Protection of surface water quality is the purpose of the draft permit and therefore each issue is relevant and material.

#### **H. Issues Recommended for Referral**

OPIC recommends that the following disputed issues of fact be referred to the State Office of Administrative Hearings for a contested case hearing:

1. Should TCEQ have processed the expansion and original construction of the facility as a "new source" as defined by 40 CFR §122.2? Were there fact issues relevant to the "new source" determination that have not been considered?
2. Has the applicant made a demonstration that there are sufficient remaining load allocations in the North Bosque River to allow for discharges from the expansion of this dairy or that existing dischargers were subject to compliance schedules as required by 40 CFR §122.4 (i)?
3. Will the issuance of the proposed permit be inconsistent with the following assumptions made in the TMDL for phosphorus inputs into the North Bosque River:
  - A) 40,450 dairy cows in the watershed;
  - B) 50% of solid manure from 40,450 dairy cows would be removed from the watershed;
  - C) Phosphorus in the diet of permitted cows would be limited to 0.4%;
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4. Will allowing the use of third party fields in the draft permit act as a disincentive to transport waste to a compost facility or out of the watershed to the detriment of the water quality standards?
5. Has the ED provided adequate technical justification that the measures recited in the draft permit will meet the water quality standards for phosphorus and actually attain the reductions in phosphorus loading set forth in the TMDL and TMDL-I Plan for the North Bosque River?

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<sup>3</sup> *Id.*

6. Does the permit adequately consider the factors specified in 40 CFR §125.3(d)(2) and Clean Water Act §304 (b)(4)(B)?
7. Is the amount of phosphorous being produced versus what is being hauled out and or land applied properly accounted for in the draft permit?
8. Has the permit adequately taken into account the organic phosphorous application rates which would occur at maximum solids application rates, rather than planned application rates?
9. Would it be more accurate for the NMP include data related to the application of solids from the settling basin since such solids will likely be applied to LMUs?
10. Is the water balance in the permit application used to calculate runoff amounts appropriate?
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19. Should TCEQ include a definition for "vegetative buffers" in the permit or require that they meet the same standard as "filter strips" in NRCS Code 393?
20. Are the table and map in Section X.F of the draft permit ambiguous and therefore unenforceable?

21. Is the draft permit adequately clear where the measurement of the vegetative buffers and filter strips begin in relation to the stream bed to allow adequate enforcement?

**I. Maximum Expected Duration of Hearing**

Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be 10 months from the first date of the preliminary hearing until the proposal for decision is issued.

**IV. CONCLUSION**

OPIC recommends referring the matter to SOAH for an evidentiary hearing on the issues recommended above. OPIC recommends finding the City of Waco to be an “affected person.” OPIC further recommends a hearing duration of 10 months.

Respectfully submitted,

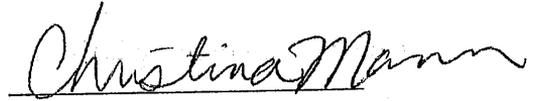
Blas J. Coy, Jr.  
Public Interest Counsel

By   
Christina Mann

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2008, the original and eleven true and correct copies of the Office of the Public Interest Counsel's Response to Request for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail



**Christina Mann**

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**TCEQ DOCKET NO. 2007-1496-AGR**

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