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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

August 15, 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 AUG 15 PM 3:46
CHIEF CLERKS OFFICE

RE: BROUMLEY DAIRY
TCEQ DOCKET NO. 2008-0427-AGR

Dear Ms. Castañuela:

Enclosed for filing is the Public Interest Counsel's Response to Request for Reconsideration 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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TCEQ DOCKET NO. 2008-0427-AGR

IN THE MATTER OF
THE APPLICATION
FOR A MAJOR
AMENDMENT BY JIM
BROUMLEY AND
KEITH BROUMLEY,
DBA BROUMLEY
DAIRY FOR WATER
QUALITY PERMIT NO.
WQ0003395000

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY

2008 AUG 15 PM 3:47
TCEQ'S OFFICE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

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 Reconsideration¹ in the above-referenced matter.

I. INTRODUCTION

Jim Broumley and Keith Broumley DBA Broumley Dairy (Applicant or Broumley Dairy) have applied to TCEQ for a major amendment of existing Concentrated Animal Feeding Operation (CAFO) Texas Pollutant Discharge Elimination System (TPDES) permit no. WQ0003395000. The major amendment to the CAFO individual permit would allow it to expand its dairy head capacity from 990 head (Holstein cows) to 1499 total head (Jersey cows) of which 1,100 head are milking cows, with no proposed increase in waste production from the previous permit due to the smaller milking breed. In addition, Applicant requests a decrease in Land Management Units (LMUs) from 434

¹ OPIC treats City of Waco's request as a Request for Reconsideration, rather than a combined Request for Reconsideration and Request for Contested Case Hearing

acres to 229.5 acres. The facility consists of three retention control structures (RCSs) and an anaerobic digester system and LMUs. The facility is located approximately one mile south of the intersection of County Road 240 and State Highway 6, east of the city of Hico in Hamilton County, Texas 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 27, 2004 and declared administratively complete on July 7, 2006. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit Amendment (NORI) was published in the *Hico News Review* on November 9, 2006. The Executive Director completed the technical review of the application and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) was published in the *Hico News Review* on August 9, 2007. The public comment period ended on September 10, 2007. The chief clerk of the TCEQ mailed the Decision of the Executive Director and the Executive Director's Response to Comments (RTC) on February 11, 2008.

The TCEQ received a timely filed hearing request from the Sierra Club on March 12, 2008, but it was withdrawn on March 14, 2008. The City of Waco timely filed comments by letter dated September 10, 2007 and submitted a Request for Reconsideration of the Executive Director's Decision on March 12, 2008.

II. ANALYSIS

In a somewhat unusual manner, The City of Waco (Waco) has submitted a Request for Reconsideration and alternatively, Contested Case Hearing. Waco asks that that its Request be treated as a Request for Reconsideration, because all issues raised are only disputed issues of law, unless TCEQ determines that Waco raised disputed, relevant,

and material issues of fact. OPIC agrees with Waco that all issues raised have been *framed by Waco* as predominantly issues of law. To the extent that Waco raises issues of fact, OPIC notes in each case, Waco subsumes the issue under an overarching issue of law, which must be addressed before any potential case-specific issues of fact are appropriately considered. Therefore, as requested by Waco, OPIC considers the entire filing by Waco to be a Request for Reconsideration.

A. Applicable Law

A person may file a request for reconsideration no later than 30 days after the chief clerk's transmittal of the executive director's decision and response to comments. TEXAS WATER CODE § 5.556; 30 TAC §55.201(a) and (e).

Any person may file a request for reconsideration of the ED's decision. 30 TAC § 55.201(e). The request for reconsideration must state the reasons why the decision should be reconsidered. 30 TAC § 55.201(e). Responses to requests for reconsideration should address the issues raised in the request. 30 TAC § 55.209(f).

B. Issues Raised by Waco in the Request for Reconsideration

Waco broadly asserts that the Executive Director (ED) has misinterpreted what the TMDL for phosphorus in place in the North Bosque River watershed requires of individual TPDES permits. Specifically, Waco raises these issues:

The Executive Director(ED) has incorrectly interpreted the definition of "new source" as found in 40 CFR §122.2

Waco disagrees with the ED's interpretation of the definition of "new source" even when considering the additional criteria set out by 40 CFR §122.29. According to 40 CFR §122.2, a "new source" is "any building structure, facility, or installation from which there is or may be a discharge of pollutants, the construction of which commenced:

(A) after promulgation of standards of performance under CWA, § 306, or (B) after proposal of standards of performance in accordance with CWA, § 306, which are applicable to such source, but only if the standards are promulgated in accordance with §306 within 120 days of their proposal.” However the ED notes that one must also refer to 40 CFR §122.29 (b), which adds further criteria to consider:

- (i) It is constructed at a site where no other source is located;
- (ii) It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or
- (iii) Its processes are substantially independent of an existing source at the same site (In making this determination, factors to consider include to the extent the new facility is integrated with the existing facility and to the extent the new facility is engaged in the same general activity as the existing source).

The ED finds that this source cannot now be considered a new source because “the Applicant is not proposing to replace the existing process. The expansion of the RCSs to meet the new 2004 CAFO rule requirements does not meet any of the criteria outlined in 40 CFR §122.29(b), but simply expands an existing part of the facility. The dairy expansion would be integrated with the existing facility.”²

In contrast, Waco finds that since the applicant is proposing to increase herd size and change the acreage on the site dedicated to retention control structures, these changes would make the dairy a “new source.” In addition, Waco states that sources that were constructed after the promulgation of the performance standards, are in fact new sources and should have been considered a new source upon initial construction.

If the Broumley Dairy was considered to be a new source, then issuance of any permit would be fall under the more stringent requirements of 40 CFR §122.4(i), which prohibits issuance of a permit to a "new source" if the discharge from its construction or

² See Executive Director’s Response to Public Comment, mailed February 11, 2008

operation will cause or contribute to the violation of water quality standards. However, the ED states in his Response to Public Comment³, that he does not find that the draft permit violates this provision.

It is not clear to OPIC whether the ED believes the draft permit does not violate this provision merely because the Broumley Dairy is not a “new source” or because in any event the operations would not “cause or contribute to the violation of water quality standards.”

OPIC recommends granting the request for reconsideration based upon this issue to allow the ED to clarify his reasoning. If the ED is stating that the permit complies with the law, even if considered a “new source,” this would clarify the need for further *factual* evaluation for Waco. Alternatively, the permit complies only because Broumley Dairy is not considered a “new source” and the TMDL implementation plan allows the ED flexibility in meeting the TMDL, including using methods beyond restricting expansion of sources.

The ED has misinterpreted EPA guidance of the North Bosque phosphorus TMDL related to calculation of load allocations from CAFOs

Waco disagrees with the ED’s method of calculation of load allocation from CAFOs because Waco contends that not all of the potential loading has been included as required by the TMDL. The ED points out that it is following the TMDL I-Plan when calculating load allocations, which was implemented under established TCEQ rules. Waco raises this issue as it relates to the manner in which the North Bosque River TMDL is being implemented by the ED. OPIC understands that the Commission has been previously aware of the TMDL I-Plan. Unless the Commission has finds a need to further

³ *Id.*

review the TMDL I-Plan relied upon by the ED when making this permit decision, OPIC cannot recommend granting this request for reconsideration based upon this issue.

The issuance of the proposed permit is inconsistent with the following assumptions made in the TMDL for phosphorus inputs into the North Bosque River and will not insure that water quality standards are met:

- 40,450 dairy cows in the watershed;
- 50% of solid manure from 40,450 dairy cows would be removed from the watershed;
- Phosphorus in the diet of permitted cows would be limited to 0.4%;
- Waste application rates would be limited to the agronomic rates of the crop.

Waco suggests that the modeling assumptions of the TMDL restrict the ED in his permitting decisions to ensure that the watershed reflects the modeled conditions. The ED argues that the TMDL does not restrict the number of cows, require that 50% of the manure be actually removed, limit the diets of the cows, or require the Dairy to apply waste according to the crop removal rates rather than agronomic rate. As we note above, the ED is relying on the flexibility in the TMDL I-Plan to issue permits consistent with the TMDL. For the reason stated above, OPIC cannot recommend granting this request for reconsideration based upon this issue unless the Commission has finds a need to further review the TMDL I-Plan relied upon by the ED when making this permit decision.

The ED did not consider the required factors specified in 40 CFR §125.3(d)(2) and Clean Water Act §304 (b)(4)(B) when issuing the permit.

Waco argues that the ED was unresponsive to the issue raised in comments related to whether the ED had considered the factors in 40 CFR §125.3(d)(2) and Clean Water Act §304 (b)(4)(B) related to the best conventional control technology (BCT) standards. The ED responds to the issue by pointing out all the provisions in the rules and draft permit directed at reducing and minimizing all pollutants, including pathogens and

bacteria. OPIC is not clear whether the ED maintains that he has considered all the factors, and those factors are addressed by the permit terms, or whether the ED need not consider those factors at all. As with the issue of “new source” classification, OPIC finds there is a reasonable need to address this issue in order to allow the ED to clarify whether or not the provisions in the rules and permit represent the consideration of the factors described by Waco. To the extent the Commissioners find a need for clarification of the ED’s position, OPIC recommends granting the request for reconsideration based upon this issue.

The ED failed to require that the kind of third party fields allowed by the permit through contracts be considered land management units (LMUs) for the purpose of regulation.

The ED disagrees with Waco that third party fields should be considered LMUs even when existing under the strict contractual requirements because the CAFO operator does not control the third party fields under contract with the CAFO. The ED relies specifically on 30 TAC §321.42. Waco argues that all the permit’s contractual requirements essentially created “third party fields” in name only. OPIC finds that Waco is challenging the rule’s requirements as to what is considered to be a third party field. This is not an appropriate method to challenge the rule and OPIC does not recommend granting Waco’s request based on this issue.

The ED has not evaluated 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)?

Waco asserts that the *Waterkeeper* decision would require the ED require CNMPs, NUPs, RCS plans, and PPPs to be included in the application and subject to public participation. The ED responds that *Waterkeeper* only requires the Nutrient

Management Plans (NMPs) to be submitted because NMPs reflect an effluent limitation. The ED further explains the other suggested plans are submitted later during operations to ensure that the permit requirements, including the NMP, are being met. OPIC agrees with the ED's position that these plans are appropriately considered at later times, under the current regulatory methods. The other plans are the mechanisms by which the effluent limitations will be achieved (much like sewage design criteria are not required until after permit issuance for wastewater permits). OPIC reminds Waco that it may pursue a requirement that this be included in the application process through the proposal for rulemaking mechanism.

IV. CONCLUSION

OPIC recommends granting the request for reconsideration in order to clarify the ED's positions relating to the previously discussed "new source" classification issue and whether or not the provisions in the rules and permit represent the consideration of the factors at 40 CFR §125.3(d)(2) and Clean Water Act §304 (b)(4)(B). Waco has raised concerns regarding the ED's interpretation of the applicable law and the effect of that interpretation on the ED's preliminary approval of the application. Granting the request for reconsideration with a limited scope of inquiry will allow the ED the opportunity to provide additional information to the Commission and clarify his positions.

Respectfully submitted,

Blas J. Coy, Jr.

Public Interest Counsel

By 

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2008, the original and eleven true and correct copies of the Office of the Public Interest Counsel's Response to Request for Reconsideration 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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2008 AUG 15 PM 3:47
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