

TCEQ DOCKET NO. 2008-0427-AGR

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APPLICATION BY JIM BROUMLEY  
AND KEITH BROUMLEY, D/B/A  
BROUMLEY DAIRY, FOR MAJOR  
AMENDMENT TO TPDES PERMIT  
NO. WQ0003395000

§ BEFORE THE  
§ TEXAS COMMISSION  
§ ON ENVIRONMENTAL QUALITY  
§  
§

CHIEF CLERKS OFFICE

**REPLY BY THE CITY OF WACO TO THE EXECUTIVE DIRECTOR'S  
RESPONSE TO HEARING REQUESTS AND REQUEST FOR RECONSIDERATION**

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

The City of Waco ("City") files this reply to the Executive Director's response to its request for reconsideration and, alternatively, contested case hearing on the application of Jim Broumley and Keith Broumley, d/b/a Broumley Dairy ("Broumley Dairy"), for a major amendment of TPDES Permit No. WQ0003395000 and the draft permit that the Executive Director has issued to Broumley Dairy based upon that application.

**I. CITY OF WACO WITHDRAWS ITS REQUEST FOR CONTESTED CASE HEARING**

The City agrees with the Executive Director that the City is raising herein only disputed issues of law. Accordingly, the City's request should be treated by the TCEQ as a request for reconsideration of the Executive Director's decision on the Broumley Dairy permit application, in which case no contested hearing will be necessary. **The City therefore withdraws its request for a contested case hearing.**

**II. DISPUTED ISSUES OF LAW**

The City adopts herein by reference legal arguments made in the Public Comment letter that it filed on September 10, 2007, without restating them at length. The City also adopts herein by reference its identification of and discussion of each of the Executive Director's Responses to Comments that were based upon errors of law, as set out in the City's Request for Reconsideration.

The City provides the following additional reply comments referring, in parenthesis, to the Executive Director's enumeration in his response to Request for Reconsideration and to the corresponding Response to Comment ("RTC") number.

1. **(ED VI. 1; RTC 1 and 2) Whether this facility is a "new source" under federal law and if it is, whether it meets the requirements of 40 CFR §122.4 (i).**

The City adopts and reiterates the legal arguments that it made in part I.1 of its public comments in support of its contention that it Broumley Dairy is a "new source," as defined in 40 CFR §122.2. The City also agrees with the Executive Director that this issue, as raised by the City, is a matter of law.

The City disagrees with the Executive Director's interpretation of the "new source" requirements that once an applicant receives authorization to operate a dairy operation at a site it ceases to be a "new source." Because construction of all sources at the Broumley Dairy site commenced after the first promulgation of the new source standards for CAFOs on February 14, 1974, Broumley has been a "new source" ever since the initial construction and operation of a dairy at the site in 1997. Broumley Dairy has never been required to meet the requirements of a "new source" in the federal regulations and therefore should be considered a "new source."

2. **(ED VI. 2; RTC 2) Whether there has been a sufficient remaining load allocation for phosphorus in the North Bosque River to allow for discharges from the expansion of the dairy or whether existing dischargers have been subject to compliance schedules as required by 40 CFR §122.4 (i)**

The City adopts and reiterates the legal arguments that it made in part I.1 of its public comments. The City also agrees with the Executive Director that this issue, as raised by the City, is a matter of law.

The Executive Director failed to respond to the City's argument that there has been no demonstration that there are sufficient remaining load allocations for phosphorus in the North Bosque River to allow for discharges from the expansion of Broumley Dairy and that existing dischargers into this river segment have not been subject to compliance schedules. The City noted in its Request for Reconsideration that EPA Region 6 Administrator Cooke's letter dated December 3, 2001, to Executive Director Saitas includes Table 1 which expressly contains simple total daily allocations and expressly states that those allocations do not include discharges from manure/wastewater holding lagoons, RCSs. The Executive Director continues to offer no response to the City's contention that all existing dischargers into segments 1226 and 1255 of the North Bosque River have to be subject to compliance schedules before a permit can be issued to Broumley Dairy allowing its discharges.

**3. (ED VI. 3; RTC 3) Whether the draft permit is in compliance with the Total Maximum Daily Load (TMDL) and TMDL implantation plan (TMDL I-Plan) for the North Bosque River.**

The City adopts and reiterates the legal arguments that it made in part I. 2 of its public comments. The City also agrees with the Executive Director that these issues, as raised by the City, are matter of laws.

**A) Cows in the Watershed.**

The City disagrees with the Executive Director's conclusion that the TMDL does not limit the number of dairy cows in the watershed and that the TMDL is not directly tied to the number of animals permitted in the watershed. As set out in the City's public comments, the modeling used to develop the TMDL and demonstrate compliance with the water quality standards was based on a certain number of cows in the watershed.

Therefore, the 40,450 cows used in the modeling is a de facto limit on the number of cows in the watershed. Since the entire TMDL is predicated on meeting the water quality goal and since the TMDL-e scenario (using 40,450 dairy cows) is the only scenario that comes close to meeting this goal, there is an implicit limitation on the number of cows.

**B) 50% Removal of Solid Manure from the Watershed.**

The City disagrees with the Executive Director and reiterates that the modeling conducted for the TMDL established the requirements necessary to meet water quality standards in the North Bosque River. One of these requirements is removal of 50% of the solid manure from the North Bosque watershed. If this requirement is not met, the model predicts that water quality standards cannot be met. The general manure management options do not assure attainment of the state water quality standards for phosphorus in the North Bosque River.

**C) Phosphorus Limit in Diet to 0.4%.**

The City disagrees with the Executive Director and states again that state and federal rules require that permits assure attainment of water quality standards. Reducing phosphorus diets for dairy cows to 0.4% is one the BMPs that were assumed in the modeling supporting the TMDL.

**D) Application Limited to the Phosphorus Needs of the Crop.**

The City disagrees with the Executive Director. The NMP provided by Broumley Dairy allows application rates at two times the phosphorus

crop requirement until fields exceed 200 ppm phosphorus. This is contrary to the TMDL and fails to assure attainment of water quality standards for phosphorus in the North Bosque River.

4. **(ED VI. 4; RTC 6) Whether the ED failed to make a best professional judgment (BPJ) determination that the best conventional pollutant control technology (BCT) for the control of pathogens was used as required by 40 CFR § 125.3 (d) (2).**

The City adopts and reiterates the legal arguments that it made in part II of its public comments. The City also agrees with the Executive Director that this issue, as raised by the City, is a matter of law.

The Executive Director's response does not demonstrate that the TCEQ has considered any of the factors set out in 40 CFR § 125.3 (d)(2) in evaluating control technologies applied to Broumley Dairy to control the bacteria and other pathogens that it discharges. No discharge permit can be issued to Broumley Dairy until TCEQ considers those factors and makes defensible record-based findings accordingly.

5. **(ED VI. 5; RTC 7) Whether third party fields should be considered land management units.**

The City adopts and reiterates the legal arguments that it made in Part III of its public comments. The City also agrees with the Executive Director that this issue, as raised by the City, is a matter of law.

The City does not agree with the Executive Director's conclusion that the CAFO operator does not control the third party fields under contract with the CAFO. As stated by the City in its Request for Reconsideration, the legal issue that remains is whether all of the controls that

Broumley Dairy is required to exert over third party fields as provided in Part VII. A. 8 (e) (5) (i) of its permit, mean that those third party fields must be treated as LMUs under 30 TAC § 321.32 (25) and “land application areas” under 40 CFR § 412.2 (e).

6. **(ED VI. 6; RTC 8) Whether the ED must evaluate each of the following plans prior to permitting and make them available to the public throughout the public comment period due to the holding in the *Waterkeeper* case: comprehensive nutrient management plans (CNMPs), nutrient utilization plans (NUPs), RCS management plans, and pollution prevention plans (PPPs).**

The City adopts and reiterates the legal arguments that it made in Part IV of its public comments. The City also agrees with the Executive Director that this issue, as raised by the City, is a matter of law.

The City disagrees with the Executive Director’s analysis of the law as expressed in the *Waterkeeper* decision. By adopting these BMP restrictions on CAFO waste management, the TCEQ has created additional effluent limitations that must be reviewed by the agency, incorporated into the permit, and made available to the public so that it may participate effectively in the permitting and enforcement processes. TCEQ cannot ensure compliance with the CNMPs, PPPs, RSC capacity requirements and management plans, etc., without TCEQ’s reviewing them and including them in the TPDES permits that it issues.

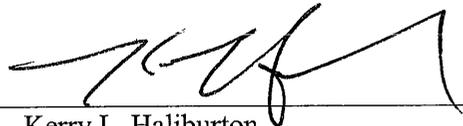
### **III. PRAYER.**

For all of the reasons explained herein, the City of Waco prays that the Commission reconsider the Executive Director’s decision on the Broumley Dairy permit application, determine that the Executive Director erred on each of the matters of law identified herein,

rescind the draft permit for Broumley Dairy, and remand the application back to the Executive Director for review in light of the correct interpretations of applicable law that are explained herein.

Respectfully submitted,

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ATTORNEYS FOR THE CITY OF WACO

#### **CERTIFICATE OF SERVICE**

I hereby certify that on this 28<sup>th</sup> day of August, 2008, true and correct copies of the foregoing Reply by the City of Waco to the Executive Director's Response to Hearing Requests and Request for Reconsideration have been served on the following persons in the manner indicated:

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FOR ALTERNATIVE DISPUTE RESOLUTION

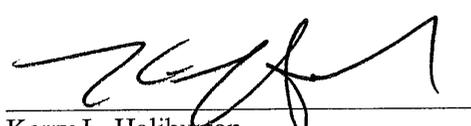
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