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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 14, 2009

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
2009 JUL 14 PM 12:45
CHIEF CLERKS OFFICE

Re: **GERBEN LEYENDEKKER**
TCEQ DOCKET NO. 2009-0590-AGR

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney
Assistant 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. 2009-0590-AGR

**IN THE MATTER OF
THE APPLICATION OF
GERBEN
LEYENDEKKER FOR
TPDES PERMIT NO.
WQ0003259000**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

2009 JUL 14 PM 12:45
CHIEF CLERKS 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) with a Response to Requests for Hearing in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

Gerben Leyendekken (Gerben or the Applicant) has applied for a major amendment and conversion to a TPDES individual permit, No. WQ0003259000 for a Confined Animal Feeding Operation (CAFO), to authorize the expansion of an existing dairy cattle facility. The facility will expand from 700 head to a maximum capacity of 999 head of milking cows. The facility is located on the south side of Country Road 261, approximately 3 miles east of the intersection with Farm-to-Market road 219, in Erath County, Texas. The facility is also located in the drainage area of the North Bosque River, in Segment No. 1226 of the Brazos River Basin.

B. Procedural Background

The TCEQ received Gerben's application on May 1, 2008 and declared it administratively complete on June 27, 2008. The Notice of Receipt and Intent to Obtain Water Quality Permit (NORI) was published in the *Stephenville Empire Tribune* on July 14, 2008, in Erath County, Texas and in Spanish in *Tex-Mex Noticias* on July 29, 2008. The Notice of Application and Preliminary Decision (NAPD) was published in *Stephenville Empire Tribune* on October 23, 2008 and in Spanish in *Tex-Mex Noticias* on October 23, 2008. The public comment period ended on November 23, 2008, and the deadline to request a contested case hearing was April 23, 2009.

TCEQ received one request for a contested case hearing from the Bosque River Coalition (the Coalition), submitted on April 22, 2009. Based on the Coalition's timely hearing requests, OPIC recommends referring this application to SOAH for a contested case hearing.

II. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76th 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 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.

A group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;

- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.¹

The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of 30 TAC § 55.205(a).

B. Determination of Affected Person Status

TCEQ received one hearing request from the Bosque River Coalition (the Coalition). Under 30 TAC § 55.205(a), a group or association seeking affected person status must show that one or more members of the group or association would otherwise have standing to request a hearing in their own right. The Coalition has claimed that three of its members otherwise have standing to request a hearing individually: Claude Kilpatrick, Torrey Moncrief, and The Ranch at Hilco, LLC.

Claude Kilpatrick claims, through the Coalition, to own 100 acres along Gilmore Creek, located approximately 2 miles from the Dairy. The Executive Director (ED) has identified this property as approximately 2.44 river miles downstream from the facility. He also claims that he uses his property as a ranch and has cattle and horses. Further, he and his family use Gilmore Creek for fishing and recreational activities.

Torrey Moncrief claims, through the Coalition, to own over 400 acres of land, bordered by Gilmore Creek, about 1.5 miles from the facility. The ED has identified his property as located about 1.89 river miles downstream from the facility.

The Ranch at Hilco, LLC (the Ranch) claims, through the Coalition, to own over 1,500 acres, approximately 1.7 miles from the facility. The ED has identified this property as bordering Gilmore Creek about 2.05 river miles downstream from the facility.

All individuals (and through them, the Coalition) claim they are affected because they own property downstream from the facility and along the waterway that receives runoff and discharge from Gerben. They, and the Coalition, state that the proposed discharge in the draft permit, and the impact this will have on water quality in Gilmore

¹ 30 TAC § 55.205(a).

Creek, threaten the use and enjoyment of their individual properties and their use of Gilmore Creek generally.

OPIC concludes that the Coalition has demonstrated interests not common to members of the general public, through asserting that three of its members have individual standing. We find a reasonable relationship between the individuals' property interests claimed and the impact of the proposed permit on those interests.

Although the ED often recommends that hearing requestors located more than one mile from a facility or discharge point are not affected, there is no rule or statute binding the Commission on this issue. Determination of "affected party" status is a fluid standard, bound by some precedent, but highly dependant on the circumstances of each individual or entity willing to undertake the large task of participating in a contested case hearing. In this situation, the Coalition has shown that its members include downstream landowners who recreate in the waterway and also use their property for economic purposes, interests not substantially changed by a distance of one or two river miles.² Furthermore, the facility is located in an area that is home to many similar facilities, which, in the aggregate, could pose a threat to water quality. Therefore, based on the circumstances as presented in the record before the Commission, OPIC recommends the Commission find the Coalition is "affected."

C. Issues Raised in the Hearing Requests

The Coalition has raised thirty two issues;

1. Whether retention control structures (RCSs) will be adequately regulated and managed to protect water quality (Comment Nos. 1, 2).
2. Whether the Draft Permit provisions for the storage of slurry from freestall barns will negatively impact water quality (Comment No. 3).
3. Whether manure production and storage is properly regulated under the Draft Permit (Comment Nos. 4, 5).
4. Whether settling basins are properly designed, regulated and certified to protect water quality (Comment Nos. 6, 7, 8, 9).

² According to the ED's map, the closest Coalition member's land bisects the river 1.89 river miles downstream from the proposed discharge point.

5. Whether capacity certification and requirements for RCSs are properly described and established in the Draft Permit to ensure water quality is protected (Comment Nos. 10, 11).
6. Whether RCS No. 1 will be able to accommodate 25-year, 24-hour precipitation event runoff and prevent degradation of water quality prior to enlargement of RCS No. 1 (Comment No. 11).
7. Whether liner certification and testing specifications are adequate to ensure protection of water quality (Comment Nos. 12, 13).
8. Whether embankment testing specifications are adequate to ensure protection of water quality (Comment No. 14).
9. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit (Comment No. 15).
10. Whether an adequate description of structural controls exists in the Draft Permit (Comment No. 16).
11. Whether the Applicant has demonstrated adequate dewatering capacity (Comment No. 17).
12. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected (Comment Nos. 18, 19).
13. Whether structural controls should be certified prior to permit issuance to ensure that water quality is protected (Comment No. 19).
14. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality (Comment No. 20).
15. Whether the Draft Permit properly manages phosphorus production (Comment No. 21).
16. Whether removal of solid manure under the Draft Permit is adequate to meet water quality requirements for the North Bosque watershed (Comment No. 22).
17. Whether land management units (LMUs) are properly sized and buffered (Comment Nos. 24, 25)
18. Whether the special provisions added to the Draft Permit to address the relocated streambed on the site are sufficient to ensure the protection of water quality (Comment No. 26).

19. Whether the Applicant's information regarding the size of its LMUs and its revised nutrient management plan (NMP) are correct and adequate to ensure the protection of water quality (Comment No. 29).
20. Whether the Applicant's projected crop yields for its LMUs and third-party fields are reasonable (Comment No. 29).
21. Whether the NMP adequately identifies soil test locations and timing (Comment No. 30).
22. Whether agronomic rates are properly calculated in the NMP (Comment No. 31).
23. Whether application of supplemental phosphorus by the Applicant will negatively affect water quality (Comment No. 32).
24. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality (Comment No. 33).
25. Whether the Draft Permit provisions regarding use of third-party fields are adequate to protect water quality (Comment No. 33).
26. Whether manure and wastewater application on third-party fields will be properly managed and regulated to prevent degradation of water quality (Comment Nos. 34, 35).
27. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year (Comment No. 36).
28. Whether the historical waste application fields should be identified in the application or the Draft Permit (Comment No. 37).
29. Whether the Draft Permit provides a meaningful definition of vegetative buffers (Comment No. 38).
30. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards (Comment No. 39).
31. Whether the Draft Permit establishes adequate reporting requirements for third party fields (Comment No. 40).
32. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third-party fields (Comment No. 41).

D. Issues raised in Comment Period

All of the issues raised in his hearing request were also raised during the comment period. The Coalition, in its hearing request, referenced specifically the Comment response numbers in the *Executive Director's Response to Public Hearing*. Each issue raised by the Coalition accurately reflects a comment or concern expressed by the City of Waco and does not go beyond the scope of the City of Waco's comments, although some issues encompass more than one comment.

E. Disputed Issues

There is no agreement between Requesters 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. All of the issues raised are issues of fact. *See* 30 TAC §55.211(b)(3)(A) and (B).

G. Relevant and Material Issues

Hearing requests may raise 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.³ Relevant and material issues are those governed by the substantive law under which this permit is to be issued.⁴

All of these issues raise specific questions about the draft permit or the application and ultimately relate to surface water quality. The TCEQ is responsible for

³ *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.").

⁴ *Id.*

the protection of surface water quality under Chapter 26 of the Texas Water Code.⁵ In addition, any application for a CAFO permit must comply with Chapter 307, as well as other relevant TCEQ rules.⁶ Therefore, all of the issues raised by the Coalition are relevant and material to the Commission's decision on this application.⁷

Specifically, TCEQ is responsible for regulating the disposal of wastes such as manure, litter and wastewater from CAFOs.⁸ Therefore, all the Coalition's issues relating to the regulation and management of these wastes are relevant and material issues.⁹

The Coalition raises several issues regarding the retention control structure (RCS) management plan and the pollution prevention plan (PPP).¹⁰ Under 30 TAC § 321.42, an applicant must implement an RCS plan¹¹ as a requirement of its individual permit.¹² An applicant must also complete a PPP in accordance with 30 TAC § 321.46. Therefore all the Coalition's issues relating to the RCS, RCS management plan, and the PPP are relevant and material issues.

The Coalition has also raised issues regarding nutrients discharged from the site and the Applicant's plans to properly manage nutrients associated with the site.¹³ TCEQ rules state there must be a site-specific nutrient management plan (NMP) for all CAFOs.¹⁴ Further, nutrients are regulated under the Texas Surface Water Quality

⁵ See specifically, Texas Water Code § 26.027(a) and § 26.003.

⁶ See specifically 30 TAC § 307.1, § 307.4 and § 307.5.

⁷ Although all issues raised by the Coalition ultimately relate to water quality, the Coalition directly references protection of water quality in Issue Nos. 1, 2, 4, 5, 6, 7, 8, 12, 13, 14, 18, 19, 23, 24, 25, 26, and 32 of its *Request for Hearing from Gerber Leyendekker/ Leyendekker Dairy; TPDES Permit No. WQ0003259000 (Leyendekker Hearing Request)*, April 22, 2009.

⁸ 30 TAC § 321, Subchapter B.

⁹ See *Leyendekker Hearing Request*, Issue Nos. 3, 14, 16, and 20, among others.

¹⁰ See *Leyendekker Hearing Request*, Issue Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, and 30.

¹¹ 30 TAC § 321.42(g).

¹² 30 TAC § 321.42(a).

¹³ See *Leyendekker Hearing Request*, Issue Nos. 15, 19, 21, 22, 23, and 27.

¹⁴ 30 TAC § 321.36(d), and 30 TAC § 321.40(k).

Standards¹⁵ and have the potential to adversely impact Texas water quality generally. Therefore, all the Coalition's issues relating to the Applicant's management and discharge of nutrients, on and off-site, are relevant and material.

The Coalition raises several issues regarding the land application of wastes generated by the facility.¹⁶ The Applicant must, at a minimum, comply with TCEQ rules governing the land application of manure, litter, or wastewater.¹⁷ In addition, any application to land owned by third parties must comply with TCEQ rules governing third party land application.¹⁸

H. Issues Recommended for Referral

OPIC recommends the Commission refer the following disputed issues of fact to SOAH for a contested case hearing, and chooses to retain the exact language of the issues listed in the Coalition's hearing request, as this most accurately reflects the concerns of the requesting entity:

1. Whether retention control structures (RCSs) will be adequately regulated and managed to protect water quality.
2. Whether the Draft Permit provisions for the storage of slurry from freestall barns will negatively impact water quality.
3. Whether manure production and storage is properly regulated under the Draft Permit.
4. Whether settling basins are properly designed, regulated and certified to protect water quality.
5. Whether capacity certification and requirements for RCSs are properly described and established in the Draft Permit to ensure water quality is protected.
6. Whether RCS No. 1 will be able to accommodate 25-year, 24-hour precipitation event runoff and prevent degradation of water quality prior to enlargement of RCS No. 1.

¹⁵ 30 TAC, Chapter 307.

¹⁶ See *Leyendekker Hearing Request*, Issue Nos. 17, 24, 25, 26, 28, 29, 31, and 32.

¹⁷ 30 TAC § 321.40.

¹⁸ 30 TAC § 321.42(j).

7. Whether liner certification and testing specifications are adequate to ensure protection of water quality.
8. Whether embankment testing specifications are adequate to ensure protection of water quality.
9. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit.
10. Whether an adequate description of structural controls exists in the Draft Permit.
11. Whether the Applicant has demonstrated adequate dewatering capacity.
12. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected.
13. Whether structural controls should be certified prior to permit issuance to ensure that water quality is protected.
14. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality.
15. Whether the Draft Permit properly manages phosphorus production.
16. Whether removal of solid manure under the Draft Permit is adequate to meet water quality requirements for the North Bosque watershed.
17. Whether land management units (LMUs) are properly sized and buffered.
18. Whether the special provisions added to the Draft Permit to address the relocated streambed on the site are sufficient to ensure the protection of water quality.
19. Whether the Applicant's information regarding the size of its LMUs and its revised nutrient management plan (NMP) are correct and adequate to ensure the protection of water quality.
20. Whether the Applicant's projected crop yields for its LMUs and third-party fields are reasonable.
21. Whether the NMP adequately identifies soil test locations and timing.
22. Whether agronomic rates are properly calculated in the NMP.
23. Whether application of supplemental phosphorus by the Applicant will negatively affect water quality.
24. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality.

25. Whether the Draft Permit provisions regarding use of third-party fields are adequate to protect water quality.
26. Whether manure and wastewater application on third party fields will be properly managed and regulated to prevent degradation of water quality.
27. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year.
28. Whether the historical waste application fields should be identified in the application or the Draft Permit.
29. Whether the Draft Permit provides a meaningful definition of vegetative buffers.
30. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards.
31. Whether the Draft Permit establishes adequate reporting requirements for third-party fields.
32. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third-party fields.

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 twelve months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSIONc

OPIC recommends granting the Bosque County Coalition's hearing request, and referring the above-referenced issues to the State Office of Administrative Hearings.

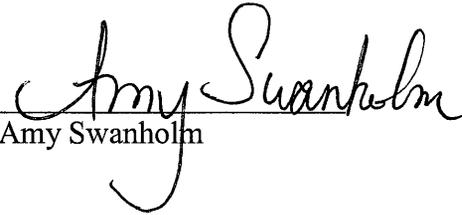
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2009 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Requests 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.


Amy Swanholm

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COMMISSION
ON ENVIRONMENTAL
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