

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



TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 24, 2009

TO: Persons on the attached mailing list.

RE: Gerben Leyendekker / Leyendekker Dairy
TPDES Permit No. WQ0003259000

Decision of the Executive Director.

The executive director has made a decision that the above-referenced permit application meets the requirements of applicable law. **This decision does not authorize construction or operation of any proposed facilities.** Unless a timely request for contested case hearing or reconsideration is received (see below), the TCEQ executive director will act on the application and issue the permit.

Enclosed with this letter is a copy of the Executive Director's Response to Comments. A copy of the complete application, draft permit and related documents, including public comments, is available for review at the TCEQ Central office. A copy of the complete application, the draft permit, and executive director's preliminary decision are available for viewing and copying at the Texas Commission on Environmental Quality, Region 4 Office, 580 West Lingleville Road, Suite D, Stephenville, Texas.

If you disagree with the executive director's decision, and you believe you are an "affected person" as defined below, you may request a contested case hearing. In addition, anyone may request reconsideration of the executive director's decision. A brief description of the procedures for these two requests follows.

How To Request a Contested Case Hearing.

It is important that your request include all the information that supports your right to a contested case hearing. You must demonstrate that you meet the applicable legal requirements to have your hearing request granted. The commission's consideration of your request will be based on the information you provide.

The request must include the following:

- (1) Your name, address, daytime telephone number, and, if possible, a fax number.
- (2) If the request is made by a group or association, the request must identify:
 - (A) one person by name, address, daytime telephone number, and, if possible, the fax number, of the person who will be responsible for receiving all communications and documents for the group; and
 - (B) one or more members of the group that would otherwise have standing to request a hearing in their own right. The interests the group seeks to protect must relate to the organization's purpose. Neither the claim asserted nor the relief requested must require the participation of the individual members in the case.
- (3) The name of the applicant, the permit number and other numbers listed above so that your request may be processed properly.
- (4) A statement clearly expressing that you are requesting a contested case hearing. For example, the following statement would be sufficient: "I request a contested case hearing."

Your request must demonstrate that you are an **"affected person."** 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. Your request must describe how and why you would be adversely affected by the proposed facility or activity in a manner not common to the general public. For example, to the extent your request is based on these concerns, you should describe the likely impact on your health, safety, or uses of your property which may be adversely affected by the proposed facility or activities. To demonstrate that you have a personal justiciable interest, you must state, as specifically as you are able, your location and the distance between your location and the proposed facility or activities.

Your request must raise disputed issues of fact that are relevant and material to the commission's decision on this application. The request must be based on issues that were raised during the comment period. The request cannot be based solely on issues raised in comments that have been withdrawn. The enclosed Response to Comments will allow you to determine the issues that were raised during the comment period and whether all comments raising an issue have been withdrawn. The public comments filed for this application are available for review and copying at the Chief Clerk's office at the address below.

To facilitate the commission's determination of the number and scope of issues to be referred to hearing, you should: 1) specify any of the executive director's responses to comments that you dispute; and 2) the factual basis of the dispute. In addition, you should list, to the extent possible, any disputed issues of law or policy.

How To Request Reconsideration of the Executive Director's Decision.

Unlike a request for a contested case hearing, anyone may request reconsideration of the executive director's decision. A request for reconsideration should contain your name, address, daytime phone number, and, if possible, your fax number. The request must state that you are requesting reconsideration of the executive director's decision, and must explain why you believe the decision should be reconsidered.

Deadline for Submitting Requests.

A request for a contested case hearing or reconsideration of the executive director's decision must be **received by** the Chief Clerk's office no later than **30 calendar days** after the date of this letter. You may submit your request electronically at <http://www.tceq.state.tx.us/about/comments.html> or by mail to the following address:

LaDonna Castañuela, Chief Clerk
TCEQ, MC-105
P.O. Box 13087
Austin, Texas 78711-3087

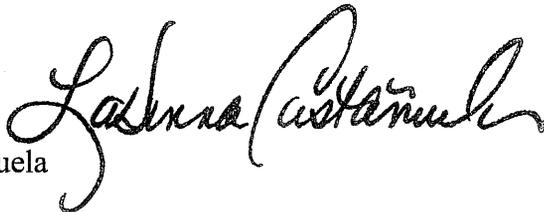
Processing of Requests.

Timely requests for a contested case hearing or for reconsideration of the executive director's decision will be referred to the alternative dispute resolution director and set on the agenda of one of the commission's regularly scheduled meetings. Additional instructions explaining these procedures will be sent to the attached mailing list when this meeting has been scheduled.

How to Obtain Additional Information.

If you have any questions or need additional information about the procedures described in this letter, please call the Office of Public Assistance, Toll Free, at 1-800-687-4040.

Sincerely,



LaDonna Castañuela
Chief Clerk

LDC/lg

Enclosures

MAILING LIST

For

Gerben Leyendekker / Leyendekker Dairy
TPDES Permit No. WQ0003259000

FOR THE APPLICANT:

Gerben Leyendekker
2335 County Road 261
Dublin, Texas 79118

Michael Martin
Stephenville Office
580 West Lingleville Road, Suite D
Stephenville, Texas 76401

Normin Mullin
Enviro-Ag Engineering, Inc.
3404 Airway Boulevard
Amarillo, Texas 79118-

PROTESTANTS/INTERESTED PERSONS:

Martin C. Rochelle, Attorney
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701-2442

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Robert D. Brush, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087

Joy Tegbe, Technical Staff
Texas Commission on Environmental Quality
Water Quality Division MC-148
P.O. Box 13087
Austin, Texas 78711-3087

FOR OFFICE OF PUBLIC ASSISTANCE
via electronic mail:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance MC-108
P.O. Box 13087
Austin, Texas 78711-3087

FOR PUBLIC INTEREST COUNSEL
via electronic mail:

Blas J. Coy, Jr., Attorney
Texas Commission on Environmental Quality
Public Interest Counsel MC-103
P.O. Box 13087
Austin, Texas 78711-3087

FOR THE CHIEF CLERK
via electronic mail:

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

Application by
Gerben Leyendekker/Leyendekker Dairy
for TPDES Permit No. WQ0003259000

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§ TEXAS COMMISSION ON
§ ENVIRONMENTAL QUALITY
CHIEF CLERK'S OFFICE

EXECUTIVE DIRECTOR'S RESPONSE TO PUBLIC COMMENT

The Executive Director (ED) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Public Comment (Response) on the application by Gerben Leyendekker/Leyendekker Dairy (Applicant) for a major amendment and conversion to Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0003259000 and on the ED's preliminary decision on the application. As required by Title 30 of the Texas Administrative Code (30 TAC) Section (§) 55.156, before a permit is issued, the ED prepares a response to all timely, relevant and material, or significant, comments. The Office of Chief Clerk timely received comment letters from the City of Waco (Waco). This Response addresses all comments received, whether or not withdrawn. If you need more information about this permit application or the wastewater permitting process, please call the TCEQ Office of Public Assistance at 1-800-687-4040. General information about the TCEQ can be found at our website at www.tceq.state.tx.us.

BACKGROUND

Description of Facility

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

Procedural Background

The application was received on May 1, 2008, and declared administratively complete on June 27, 2008. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published in the *Stephenville Empire Tribune* on July 14, 2008. The alternative language NORI was published in the *Tex-Mex Noticias* on July 29, 2008. The ED completed the technical review of the application and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published in the *Stephenville Empire Tribune* on October 23, 2008. The alternative language NAPD was published in the *Tex-Mex Noticias* on October 23, 2008.

and the public comment period ended on November 24, 2008. This application is subject to the procedural requirements adopted pursuant to House Bill 801 (76th Legislature, 1999).

COMMENTS and RESPONSES

COMMENT 1:

Waco is concerned that the draft permit does not require a stage/storage table to calculate the effect of evaporation on the monthly water balance. Waco requests that Section VII.A.5(a)(2)(iv) should be revised as follows: “a stage/storage table for each RCS with minimum depth increments of one foot, including the storage volume and surface area provided at each depth.”

RESPONSE 1:

The stage storage table is not a requirement since the ED is evaluating proposed construction. Once construction is complete an actual stage storage table will be part of the retention control structure (RCS) management plan. The construction will need to ensure that the volume requirements are met or exceeded.

The surface area used in the RCS design and water balance inflow for the RCS was calculated from the top of the berm of the existing structures, plus the expected surface area of the proposed expansion. The expected evaporation surface area used in the water balance was taken as a percentage of the total top of the berm surface area. Actual stage-storage data will not be available until the RCS expansion is complete.

COMMENT 2:

Waco comments that the draft permit does not require an RCS Management Plan until after the RCS is modified. At minimum, Waco recommends revising the draft permit to require the RCS Management Plan to be submitted to TCEQ permitting staff when completed for review and approval. Additionally, Waco comments that the draft permit does not appear to require an RCS Management Plan for the existing RCSs before the permit is issued. Waco notes that this seems inconsistent with the requirement of 30 TAC § 321.42(g), which requires an RCS Management Plan for all RCSs.

RESPONSE 2:

The CAFO rules at 30 TAC § 321.42(g) and the draft permit require that the Applicant implement an RCS management plan and maintain a copy in the pollution prevention plan (PPP). TCEQ rules do not require review of RCS management plans prior to issuing the permit. This requirement is being implemented through issuance of the permit. See 30 TAC § 321.42(a). Until the actual expansion and modification of the RCS system is completed and volumes certified, which takes place after the permit is issued, the RCS management plan cannot be completed and implemented.

The draft permit does require an RCS management Plan for all RCSs authorized in the draft permit. The Applicant has 180 days from the date the permit is issued to make RCS modifications. Until RCS modification is complete, the dairy may not exceed the 700 head currently authorized.

COMMENT 3:

Waco comments that Section X.G.3. of the draft permit allows storage of slurry from freestall barns if they are vacuumed or scraped, but that no storage areas are identified on the site map and the waste flow chart does not show any storage. Since no RCS has been identified for slurry storage, Waco believes Section X.G. should be deleted from the draft permit and replaced with a provision that makes clear that the Applicant may not store slurry from vacuum or scraping, unless the permit is amended.

RESPONSE 3:

TCEQ CAFO rules do not require a permit amendment to construct slurry storage areas. Section X.E. of the draft permit requires that any storage of slurry be in the drainage area of the RCSs. The site map identified a manure storage area within the drainage area of RCS #1. This area can be used for storage of slurry. Section X.G.3 of the draft permit states:

Slurry removed from freestall barns must be stored within the drainage area of an RCS, and the storage area must be large enough to prevent overflow into settling basins and/or RCSs. Any overflow of these storage basins shall be recorded in the PPP and notification shall be provided to the regional office within thirty (30) days. Based on review of the information this permit may be formally amended to require additional controls or other requirements.

COMMENT 4:

Waco comments that the site map indicates the presence of a calf barn outside of the drainage area. Waco states that the Applicant has not provided any information describing how manure generated from activities in the barn will be managed. Waco believes that the draft permit should include a provision prohibiting any discharge from this barn.

RESPONSE 4:

The permit only authorizes discharges from a properly designed, constructed, operated, and maintained RCS in the event of chronic or catastrophic rainfall events, or catastrophic conditions that cause an overflow. Discharges are not authorized under any circumstances from the calf barn outside the drainage area of the RCS.

COMMENT 5:

Waco comments that the Applicant indicates that the majority of runoff will flow directly through the manure storage area. Waco suggests amending the draft permit to require a network of berms or ditches to route the runoff and process wastewater around the manure storage piles.

RESPONSE 5:

As runoff encounters a manure storage pile, the pile itself will re-direct the runoff around it. If the pile is not large enough to divert the runoff around it, runoff may travel over or through the pile. Any manure transported by the runoff into the RCS and settling basins is addressed by the requirements in Special provision X.E. and X.M. Special Provision X.E. requires that the sludge volume in RCS #1 be measured and recorded in the PPP, as needed, but at a minimum, beginning in year three of the permit and then annually thereafter. Special Provision X.M. requires that manure and settled solids accumulations in the settling basin be removed on a regular and consistent basis to assure attainment of the 60% designed removal efficiency. These provisions are sufficient to manage any likely runoff through the manure storage stockpile. Therefore, the ED declines to make this change.

COMMENT 6:

Waco comments that settling basins meet the definition of RCSs. Waco notes that Section VII.A.3(a) of the draft permit appears to be inconsistent with TCEQ rules concerning capacity certifications for settling basins. Waco believes a capacity certification for the settling basin should be required.

RESPONSE 6:

The permit requires that documentation describing the sources of information, assumptions, and calculations used in determining the appropriate volume capacity and structural features of each RCS must be included in the PPP.

The ED agrees that settling basins are defined as RCSs. However, settling basins are an optional treatment practice to reduce sludge accumulation in the RCS designed to store wastewater. Settling basins are not used to store wastewater, so their capacity may not be used to meet the minimum required volume on page 1 of the draft permit. Therefore, the capacity of the settling basin is not relevant for purposes of sizing the RCS so that it meets the 25-year, 10-day design volume.

COMMENT 7:

Waco comments that there is no evidence in the permit application that the settling basin will meet the removal efficiency assumption of 60% of the solids. Waco comments that the Applicant cites the Midwest Plan Services Structures and Environment Handbook in justifying the removal rate, but notes that pond identified as the settling basin was built as a storage lagoon. Therefore, the Applicant has not justified use of a 60% solid removal rate.

RESPONSE 7:

The Midwest Plan Service Structures and Environmental Handbook, the Applicant used to derive the settling basin removal rate, states that: "Settling basins remove 50%-85% of the solids from lot runoff..." The application is based on 60% removal rate, which falls within the acceptable range in the reference material. The draft permit requires that documentation describing the sources of information, assumptions, and calculations used in determining the appropriate volume capacity and structural features of each RCS must be included in the PPP.

The RCS is designed for five years of sludge accumulation. If the settling basins do not achieve the removal efficiencies proposed in the design calculations, sludge will accumulate in the RCS at a faster rate than expected. The permit addresses this issue by requiring sludge accumulation to be monitored as needed, but at least annually beginning in year three of the permit. Taking volume measurements starting in year three will help reevaluate the accumulation rates prior to reaching the five-year design volume. The permit also requires the Applicant to maintain the sludge volume at or below the designed sludge volume.

COMMENT 8:

Waco comments that there should be more specific requirements for removing manure and solid accumulations in the settling basins. Waco recommends that Section X.M. of the draft permit be revised as follows: "Solids from the settling basin shall be removed after every rainfall event in excess of one inch and at a minimum of four times per year."

RESPONSE 8:

The ED declines to make this change. Settling basins are used to reduce the sludge accumulation in RCSs. The RCS is designed for five years of sludge accumulation. If the settling basins do not achieve the removal efficiencies proposed in the design calculations, sludge will accumulate in the RCS at a faster rate than expected. The permit addresses this issue by requiring sludge accumulation to be monitored as needed, but at least annually beginning in year three of the permit. Taking volume measurements starting in year three will help reevaluate the accumulation rates prior to reaching the five-year design volume. The permit also requires the Applicant to maintain the sludge volume at or below the designed sludge volume.

COMMENT 9:

The City comments that settling basin solids should be defined as "sludge" and not "manure" as in Section X.H.1.

RESPONSE 9:

The ED declines to make this change. Settling basin solids are not "sludge" since there is no sludge volume allocation. Therefore, settling basin solids are defined as "manure."

If settling basin solids are land applied, an annual sample must be collected and analyzed in accordance with Section VII.A.9(a) of the permit, in addition to other manure and wastewater.

COMMENT 10:

Waco comments that Section VII.A.3(a)(2) should be amended to make it clear that all capacity certifications require certification of both total as-built capacity and the remaining capacity as a result of sludge accumulation by inserting the following sentence: "Capacity certifications shall include both the total as-built RCS capacity and the remaining RCS capacity due to sludge accumulation."

RESPONSE 10:

Capacity certifications reflect the total as-built capacity. This maximum volume does not change, unless modifications are made to the RCS. Sludge accumulations, on the other hand, fluctuate, just as the wastewater levels fluctuate. Sludge accumulations are required to be monitored and recorded in the PPP, as necessary, but at minimum, within one year of the new capacity certification for the RCS expansion and then annually thereafter.

COMMENT 11:

Waco comments that the existing capacity certification for RCS #1 does not state whether the listed capacity is an as-built or existing capacity. Waco states that without certification of the sludge volume, the Applicant cannot demonstrate that RCS #1 will accommodate the 25-year, 24-hour storm event, as required, until it is enlarged.

RESPONSE 11:

The current RCSs volumes are not relevant to what is proposed by this permit application and are not required as part of the permitting process. Existing RCS volume requirements are contained in the existing authorization and are enforced under that authorization by TCEQ Field Investigators. If the draft permit is issued, the new 25-year, 10-day volume requirements will become effective and construction is required to meet those new requirements within 180 days. The RCSs must meet the new requirements before the dairy is authorized to exceed 700 head. The required minimum volume allocations are shown in X.A.1. of the draft permit. Section VII.A.3.(a) of the draft permit requires that after completion, liner and capacity certifications for new construction be maintained in the PPP.

COMMENT 12:

Waco comments that the Applicant has not properly certified the settling basin or RCS. Waco asserts that the liner certifications submitted with the permit application are inadequate. Waco encourages TCEQ to require, prior to issuance of the permit, that all basins and RCSs be certified by a professional engineer.

RESPONSE 12:

TCEQ regional inspectors can review the current liner certifications during site inspections and determine their compliance with TCEQ rules and the existing authorization. RCS #1 from the previous authorization will become the settling basin and RCS #2 from the previous authorization will become RCS #1. The permit requires RCS #1 to be enlarged to contain the required capacities listed on page 1 of the permit. Section VII.A.3(a) of the draft permit also requires documentation of liner and capacity certifications to be completed for the modified RCS prior to use after modification and requires that documentation be maintained in the on-site PPP. Also, note that Section X.A.2. of the draft permit gives the Applicant 180 days after the permit is issued to complete all RCS modifications required by the permit.

COMMENT 13:

Waco comments that in previous Bosque CAFO permits, TCEQ required a minimum of one floor sample per acre of surface area and a minimum of one sidewall sample per each two acres of surface area in order to certify the hydraulic conductivity of the liner. Waco believes this should be the minimum standard in this permit as well.

RESPONSE 13:

The requirement in the draft permit exceeds the requirement of the existing permit and of the rules. Section VII.A.2.(g)(3)(ii) of the draft permit requires that for each RCS, a minimum of one undisturbed sample must be collected per plan surface acre at the spillway elevation.

For the purpose of determining the number of samples to collect, surface acres must be rounded up to the next whole acre. Distribution of the samples must be representative of liner characteristics and proportional to the surface area of the sidewalls and floor. Documentation must be provided identifying the sample locations with respect to the RCS liner. This requirement is considered to provide certifications that will adequately document the permeability of the RCS liners. Therefore, the ED declines to make the change.

COMMENT 14:

Waco recommends that in addition to the compaction testing requirement at Section VII.A.3(f)(4) of the draft permit that also require the following: 1) requiring the field density tests be based on predetermined moisture density compaction curves, 2) defining the frequency of testing, 3) requiring compaction testing on each lift during construction of the liner, 4) requiring documentation of compaction test locations and results provided to TCEQ, and 5) requiring continuous on-site inspection during construction.

RESPONSE 14:

Section VII.A.3(b) of the permit requires that the RCS be designed and constructed in accordance

with the technical standards developed by NRCS, ASABE, ASCE, or ASTM. Additionally, the permit identifies specific RCS design, construction, and testing criteria in Section VII.A.3.(f). The construction and testing requirements for embankment lifts are in Section VII.A.3.(f)(2) and that section states:

Embankment Lifts. The embankment shall be constructed in lifts or layers no more than eight (8) inches compressed to six (6) inches thick at a minimum compaction effort of 95 percent (%) Standard Proctor Density (ASTM D698) at -1% to +3% of optimum moisture content.

The compaction testing requirements are in Section VII.A.3(f)(4) and are as follows:

Compaction Testing. Embankment construction must be accompanied by certified compaction tests including in place density and moisture in accordance with the American Society of Testing Materials (ASTM D 1556, D 2167 or D 2937 for density and D 2216, D 4643, D 4944 or D 4959 for moisture, or D 6938 for moisture and density. Compaction tests will provide support for the liner certification performed by a licensed Texas professional engineer as meeting a permeability equal to, or less than, 1×10^{-7} cm/sec over a thickness of 18 inches or its equivalency in other materials.

More specific liner requirements are included in Section VII.A.3(g)(2) of the permit:

The liner must be designed by a licensed Texas professional engineer and documented to have hydraulic conductivities no greater than 1×10^{-7} cm/sec in accordance with ASTM D 5084, or other method approved by the ED, with a thickness of 18 inches or greater or its equivalency in other materials. The ED believes these testing requirements are adequate and protective of water quality.

COMMENT 15:

Waco comments that the draft permit should include a specific list of circumstances that would qualify for granting extensions to the RCS compliance schedule.

RESPONSE 15:

The conditions that may delay construction of a RCS are numerous and highly variable. The extension request must provide an explanation of the conditions that prevented construction during the specified timeframe. The ED will evaluate the specific reasons to determine if an extension should be granted.

COMMENT 16:

Waco comments that the permit application does not provide an adequate description of the structural controls, particularly the berms and the ditches.

RESPONSE 16:

A Runoff Control Map was submitted by the Applicant that clearly identifies the control features directing run-off. This map shows a thick dashed line identified as the ditch, berm, and underground pipe.

The permit only authorizes discharges from a properly designed, constructed, operated, and maintained RCS in the event of chronic or catastrophic rainfall events, or catastrophic conditions that cause an overflow. Discharges are not authorized under any circumstances from diversion structures.

The permit requires the Applicant to conduct weekly inspections on all control facilities, including the RCS, storm water diversion devices, runoff diversion structures, control devices for management of potential pollutant sources, and devices channeling contaminated storm water to the RCS; and to annually conduct a complete site inspection of the production area. Additionally, the permit requires the Applicant to have a licensed Texas professional engineer complete a site evaluation of the structural controls every five years.

COMMENT 17:

Waco comments that the Applicant has failed to demonstrate the adequacy of its dewatering capability and it asks the ED to verify the dewatering capabilities of the equipment listed in the application.

RESPONSE 17:

TCEQ rules do not require ED review or approval of the equipment an applicant will use to dewater the RCS. The draft permit requires that the Applicant ensure that the irrigation system design is capable of removing wastewater from the RCS on a regular schedule. Equipment capable of dewatering the RCS must be available and operational whenever needed to restore the operating capacity required by the RCS management plan. This gives the Applicant flexibility on the type of equipment to be used at the time of dewatering.

COMMENT 18:

Waco comments that the draft permit does not require the annual facility inspection report or five year evaluation to be sent to TCEQ as required by 30 TAC §§ 321.46(c)(2) and (e)(2). The City states that submission to TCEQ should be required by the draft permit and not just be kept in the PPP.

RESPONSE 18:

The rules cited by Waco do not require these records be submitted to TCEQ. However, 30 TAC § 321.46(d) requires that these records be maintained on site for a minimum of five years from the date

the record was created and submitted to the Commission within five days upon written request by the ED. These records should be maintained in the PPP where they are subject to review during site inspections conducted by TCEQ field staff. Failure to conduct an annual site inspection or the five year evaluation; and to document the findings of both in the PPP or failure to correct the deficiencies identified would be a violation of the permit and rules subjecting the Applicant to potential enforcement action by the Commission.

COMMENT 19:

Waco comments that the draft permit should be amended to require that an engineer certify to the adequacy of structural controls in the five year evaluation. Additionally, Waco comments that the Applicant should be required to provide a current certification of structural controls before the draft permit is issued.

RESPONSE 19:

The draft permit will require a licensed Texas professional engineer to review the existing engineering documentation, complete a site evaluation of the structural controls, review existing liner and RCS capacity documentation, and complete and certify a report of their findings. The site evaluation would be a comparison of what is required by the engineering documentation and the actual structural controls, as constructed, operated, and maintained. Should the engineer determine that the structural controls are inadequate with respect to the design requirements in the engineering documentation, those findings would be included in the certified report. Licensed Texas professional engineers are subject to standards of performance as established by the Texas Board of Professional Engineers. These permit provisions become effective upon issuance of the draft permit.

There are no rule requirements that require certification of existing structural controls prior to issuance of the permit.

COMMENT 20:

Waco comments that the draft permit fails to require adequate sampling of wastewater and manure, with respect to sample collection and frequency, and the approximate locations or time of year that soil tests will be taken. Waco comments that this information is necessary to properly use Texas NRCS Code 590.

RESPONSE 20:

The permit provisions for sampling and monitoring are consistent with 30 TAC § 321.36(g) and with the requirements of NRCS Practice Standard Code 590. The draft permit requires that representative samples be collected annually for manure, wastewater, and soils. The results of the analyses must be used in determining application rates. Because they are used in determining application rates, the sample collection should be representative of the material, as applied. If manure and wastewater samples are not representative of the materials, as applied, the following year's soil analyses may be

higher than expected. This in turn would result in a reduced application rate.

Texas NRCS Code 590 (p. 590-7) requires the approximate locations where soil tests will be taken and the timing and frequency of soil sampling. Page 7 of the NMP, in the permit application, states the location as "each field" and frequency as "annually". These statements comply with 30 TAC § 321.36(g) and Section VII.A.9.(b) of the draft permit.

COMMENT 21:

Waco comments that the draft permit fails to account for proper management of phosphorus production. Waco comments that 999 cows will produce 389 lb/day P₂O₅ which is equivalent to 141,985 lb/yr P₂O₅ and only 38,999 lb/yr of P₂O₅ will be applied to LMU's or third-party fields as indicated in the NMP. Waco states that leaves 102,986 lb/yr P₂O₅ to be managed.

RESPONSE 21:

The permit application identifies how much phosphorus is generated and the methods used to utilize or dispose of it. It is projected that 999 cows will generate 389 lbs. of phosphorus per day. The calculation is based on a book value for phosphorus production by dairy cows developed by the American Society of Agricultural and Biological Engineers. It is part of a set of data intended for use in designing facilities to accommodate actual waste production. As long as the phosphorus being land-applied or hauled-out is accounted for as required under TCEQ rules, an accounting to reflect what remains in the CAFO production area is not necessary.

COMMENT 22:

Waco recommends that the draft permit be revised to require that up to 50% of the waste generated by the proposed operation be managed outside of the North Bosque watershed in a manner that is consistent with the goals of the applicable TMDL.

RESPONSE 22:

The North Bosque TMDL has a goal of a 50% reduction in instream loading. The TMDL and TMDL I-Plan address growth of CAFOs through BMPs designed to decrease loading. Neither the TCEQ rules nor the TMDL I-Plan requires a 50% haul-out of collectible manure.

COMMENT 23:

Waco comments that multiple NMP's have been submitted and that the draft permit should state the date of the most recent NMP that the facility will operate under for the year following permit issuance.

RESPONSE 23:

In response to comment, the date of the most recent NMP was added to Section V of the Fact Sheet.

COMMENT 24:

Waco comments that Texas NRCS Code 590 requires sampling to be conducted in accordance with Texas A&M University guidance. The course and guidance limit the size of LMUs to 40 acres or less. Three of the Applicant's LMUs are greater than 40 acres. Waco recommends subdividing the three oversized LMUs to meet the NRCS Code 590 standard and requiring submission of a revised LMU map and revised NMP.

RESPONSE 24:

The CAFO rules in 30 TAC Chapter 321 do not require that the soil sampling area define the size of an LMU. Also, the CAFO rules do not specify or limit the size of a LMU. Management considerations are important when determining LMU size.

COMMENT 25:

Waco comments that the Applicant is not proposing to adequately buffer well #8 in LMU #4. Waco notes that this well is buffered into LMU #4 not away from it. Waco states that the Applicant should be required to correct its maps, recalculate the LMU acreage, and prepare a new NMP based on the revised acreage.

RESPONSE 25:

The Applicant identified in Figure 1.3 and Figure 5.3 (Rev 02/03/09) that well #8 has a buffer of 150 feet around it. The draft permit states that a 150 foot buffer must be maintained around wells #5-#9. Therefore, the application and draft permit meet the buffer requirements in 30 TAC § 321.38(b)(2).

COMMENT 26:

Waco comments that the USGS map of the Applicant's property indicate a stream bed transecting the facility and running just north of LMU #1 and #1A. Waco notes that correspondence in the TCEQ file indicate this stream was diverted to run south of the RCSs when they were constructed. Therefore, the new stream location is not properly identified on the maps submitted with the permit application. Additionally, Waco states that the stream must be buffered in its new location and that those buffers have not been identified. Once buffers have been identified the acreage in LMU #1 and #1A should be adjusted and a revised NMP prepared.

RESPONSE 26:

The Applicant revised maps (Figures 1.3, 3.1, 5.2, 5.3 and 6.1) to show a grassed waterway for the relocated stream bed. In response to the comment, the ED added the following Special Provision to the draft permit to address this issue:

X.Q.: Grassed Waterways.

1. The permittee shall design, construct, and maintain grassed waterways around the relocated native stream bed on the south of the settling basin and RCS #1:
 - a. The design and construction shall adhere to the capacity, velocity, width, side slopes, depth, drainage, outlets, vegetative establishment, and plans and specifications requirements as described in NRCS Practice Standard Code 412, as amended.
 - b. The grassed waterways shall be planted and maintained in permanent vegetation, such as Bermuda grass. The period for re-establishment of vegetation following maintenance activities is not a violation of this provision.
2. The permittee shall develop and implement an operation and maintenance plan for the grassed waterways in accordance with NRCS Practice Standard Code 412, as amended. The plan shall be kept in the PPP. The operation and maintenance plan shall include the following:
 - a. The permittee shall inspect the grassed waterways weekly and within 24 hours after a one inch or greater rainfall event, in accordance with Section VII.A.10(a) of this permit. The inspection report shall document the presence of bare areas, erosion, ponding or puddling of water, and depressions or reduced vegetation density that may lead to erosion, ponding or puddling.
 - b. In the event that bare areas, erosion, ponding or puddling, depressions, or reduced vegetation density are documented in the inspection report, the permittee shall:
 - i. submit the inspection report to the TCEQ Regional Office within 5 days of the date of inspection, and
 - ii. implement corrective actions within 30 days of the inspection. In the event that corrective actions cannot be implemented within 30 days, the permittee shall document the factors delaying implementation of corrective actions and implement corrective actions as soon as possible.

3. In conjunction with the five year evaluation required by Section VII.A.10(b) of this permit, a licensed Texas professional engineer must review NRCS Practice Standard Code 412, complete a site evaluation of the grassed waterway, and include their findings in the certified report.
4. Channelized flow leaving the grassed waterways is prohibited by this permit.

COMMENT 27:

Waco comments that the boundaries of LMU #2 are incorrect and that the area should be recalculated; and a revised NMP prepared based on the revised acreage.

RESPONSE 27:

The Applicant has since submitted a revised NMP with the correct acreage for LMU #2 (35 acres) and all the affected maps submitted with the permit application were also revised to show the proper acreage. Page 1 of the permit was revised to show LMU #2-35 acres. Attachment B was also updated to reflect this change.

COMMENT 28:

Waco comments that the area of LMU #1A is 16 acres, but is represented as 25 acres in the permit application. Waco comments that the acreage needs to be corrected and a new NMP prepared or additional portion of LMU #1A be identified on the map.

RESPONSE 28:

The ED verified that LMU #1A was approximately 25 acres during technical review of the permit application. The Applicant has since revised the Proposed Site & Land Management Unit map to identify all portions of LMU #1A on that map.

COMMENT 29:

Waco comments that the Applicant should be required to submit to TCEQ the actual annual yields of harvested crops for both LMUs and third party fields to demonstrate that reasonable crop yields are being used. Alternatively, Waco requests that Section VII.8(e)(5)(iv) be revised to clarify the methods that TCEQ will employ to determine compliance in the absence of any annual harvested yield reporting.

RESPONSE 29:

Record keeping requirements at 30 TAC § 321.46(d)(8)(F) state the actual yield of each harvested crop for LMUs must be recorded on a monthly basis. The information is available to the ED during

field investigations. Crop removal rates are based on yields when the NMP software is used.

There are no rules requiring CAFO operators to track yields on 3rd party fields. 30 TAC § 321.42(j) requires CAFO operators to submit records to the appropriate region office on a quarterly basis that contain the name, locations, and amounts of litter or wastewater transferred to operators of third party fields.

COMMENT 30:

Waco comments that the Applicant's proposed NMP does not include the approximate locations or time of year that soil tests will be taken. Waco questions how the NMP can be consistent with NRCS Code 590 without this information.

RESPONSE 30:

Section VIII.A.4 requires the Applicant to update records annually to include the actual annual yield of each harvest crop for each LMU. The information is available to the ED during field investigations. Crop removal rates are based on yields when the NMP software is used.

The draft permit allows the Applicant to provide wastewater, sludge or manure to third-party fields. The third party field operators must adhere to the contract requirements outlined in the draft permit, which include land application at an agronomic rate based on soil test phosphorus. The draft permit establishes a three tiered approach to application rates on third-party fields. The proposed crop and yield goal are used by the third-party operator to determine the application rates. In the event the yield goal is not achieved, the soil test results will be higher than expected. If soil test results reach 200 ppm, the Applicant cannot provide wastewater, sludge or manure to that third-party field operator. Based on these requirements, the ED disagrees that submitting crops and yields on third-party fields is necessary.

COMMENT 31:

Waco comments that NMP does not account for the nutrients available to plants in the root zone to satisfy the crop requirement.

RESPONSE 31:

NMPs are developed in accordance with NRCS Practice Standard Code 590. NMPs evaluate nutrients in the soil as part of the Phosphorus Risk Index. The allowable application rate, as determined by the NMP, takes both risk factors and soil phosphorus levels into account.

COMMENT 32:

Waco comments that the Applicant plans to apply supplemental inorganic phosphorus to LMU #1, #3, and #4. Waco suggests requiring the Applicant to apply manure at a higher rate versus being

allowed to apply supplemental phosphorus as proposed in the NMP is the more prudent approach.

RESPONSE 32:

Appropriate utilization of the nutrients is tied to the BMPs used and is not based on nutrient source. These BMPs include, but are not limited to, land application at agronomic rates and hydrologic needs of the crop in accordance with an NMP, adherence to buffers between land application areas and water in the state; and the prohibition of discharges from land application areas. Whether the nutrients required by the crop are supplied from organic or inorganic sources is irrelevant so long as the Applicant adheres to the required BMPs.

The right half of Table 7 of the NMP is entitled "Supplemental Nutrients Needed at Planned Rates." That the nutrients are "needed" does not equate to "will be applied." The values in this table are calculated by the worksheet and do not represent entries by the NMP preparer. The scores for inorganic P₂O₅ application rate in the PI Index by the field table for the NMP suggest that supplemental P₂O₅ may be added.

COMMENT 33:

Waco comments that the draft permit should be revised to prohibit waste application onto non-cultivated fields. At minimum, Waco encourages TCEQ to prohibit application of manure on non-cultivated fields within 500 feet of a stream. In addition, Waco comments that a specific permit provision be added to require adherence to NRCS Code 590 on third party fields if it is more restrictive and that TCEQ should require NMPs for third party fields.

RESPONSE 33:

The ED declines to make the requested change regarding NRCS Code 590 because the CAFO rules do not require that land application on third party fields be consistent with the NRCS Practice Code 590. However, the limitations placed in the draft permit assure that application on third party fields will take into account the potential for phosphorus build-up to occur. Land application on third party fields may not exceed a maximum of 200 ppm of phosphorus. When a third party fields tests 200 ppm or higher for phosphorus, all land application on that field must cease.

The application limitations on third party fields are based on soil test phosphorus levels instead of the Phosphorus Risk Index. The restrictions are more conservative than the rules require. Similar to an NMP, as soil phosphorus levels increase on third party fields, the Applicant will have to reduce waste application rates in order to continue land applying on those fields and to prevent those fields from exceeding 200 ppm of phosphorus.

Section VII.A.8(e)(5) provides the requirements for third-party fields. These provisions apply to cultivated and non-cultivated fields, with the exception of (5)(i)(B), which is specific to cultivated fields. Cultivated fields are fields used for row cropping that require the ground to be tilled, disced, or plowed to prepare for seed planting, such as corn, wheat, and oats. Non-cultivated fields are used

to grow plants that do not require the ground to be tilled, disced, or plowed, such as Bermuda grass or native grasses. If the requirement in (5)(i)(B) to incorporate manure and sludge was applied to non-cultivated fields, the vegetation would be significantly damaged, thus reducing the yield goal and nutrient uptake. The ED finds that the permit has adequate provisions related to land application on both cultivated and non-cultivated third-party fields.

Section VII.A.8(e)(5)(i)(A) of the permit requires that all transferred wastewater, sludge, or manure must be beneficially applied to third-party fields identified in the PPP in accordance with the applicable requirements in 30 TAC §§ 321.36 and 321.40 at an agronomic rate based on soil test phosphorus. The requirements for development or implementation of a NMP or NUP, under 30 TAC § 321.40, do not apply to third-party fields; and 30 TAC § 321.40(h) requires that “vegetative buffer strips must be no less than 100 feet of vegetation to be maintained between manure, litter, or wastewater application areas and water in the state. The CAFO operator must maintain the buffer strips in accordance with NRCS guidelines.

COMMENT 34:

Waco comments that according to the technical information packet, the Applicant appears to plan to apply wastewater to third party fields. However, Waco notes that there does not seem to be any way wastewater can be applied without using any portion of the dairy’s irrigation system, since utilizing this type of system would necessitate control over the third party field by the Applicant, which is prohibited. Waco recommends the draft permit be amended to allow wastewater application to third party fields only when wastewater is transported from the dairy by truck.

RESPONSE 34:

TCEQ rules do not require a review or approval of the mode of conveyance an applicant will use to transport wastewater to third-party field. The draft permit allows the Applicant to provide wastewater to operators of third party fields, but does not specify the delivery method. This gives the Applicant flexibility on the mode of transportation to be used at the time of transfer to third party fields. Therefore, the ED declines to make the change as requested by Waco.

COMMENT 35:

Waco comments that the draft permit should be revised as to not allow sludge to be applied to third-party fields. Waco comments that 30 TAC § 321.42(j) allows only manure, litter, and wastewater to be applied to third-party fields.

RESPONSE 35:

30 TAC § 321.32(49) defines sludge as solid, semi-solid, or slurry waste generated during the treatment of or storage of any wastewater. The term includes materials resulting from treatment, coagulation, or sedimentation of waste in a RCS. 30 TAC § 321.32(56) defines waste as manure (feces and urine), litter, bedding, or feedwaste from animal feeding operations. Therefore, sludge is

a product of the treatment, coagulation, or sedimentation of its parent materials, waste, and wastewater. More simply, it is modified manure and wastewater. Therefore, 30 TAC § 321.42(j), which allows dairy operators to transfer manure, litter, and wastewater to operators of third party fields is inclusive of sludge. The draft permit incorporates this rationale by explicitly including the term sludge when appropriate.

Appropriate utilization of the nutrients is tied to the BMPs used and is not based on nutrient source. These BMPs include, but are not limited to, land application at agronomic rates and hydrologic needs of the crop, adherence to buffers between land application areas and water in the state, and the prohibition of discharges from land application areas. Land application on third party fields is not only limited to agronomic rates, but is further limited by soil test phosphorus ranges. For example, land application rates may not exceed the crop nitrogen requirement when soil phosphorus concentration in Zone 1 is less than or equal to 50 ppm phosphorus. Ultimately, land application on third party fields is prohibited once the soil test phosphorus level is equal to or greater than 200 ppm.

COMMENT 36:

Waco comments that the draft permit fails to require a demonstration of sustainability for the term of the permit.

RESPONSE 36:

30 TAC § 321.36(d)(2) and Section VII.A.8(a) of the permit require the operator to create and maintain a site-specific NMP along with documentation regarding implementation of the plan. 30 TAC §§ 321.36(e) and (g) and Section VII.A.8(c)(1) through (5) of the permit require annual sampling and the NMP must be updated to modify application amounts based on soil testing and wastewater testing. A five-year NMP would be impracticable because the NMP is likely to change yearly due to changing climatic and operational conditions; and soil sampling results. It is important that NMPs remain flexible. When the NMP is updated, the new version should be kept with their PPP documentation and available to TCEQ personnel during field investigations.

Long term sustainability of a field may be a planning consideration, but there are no rule requirements that LMUs be sustainable for the permit term.

COMMENT 37:

Waco comments that the historical waste application fields should be identified in the application or the permit.

RESPONSE 37:

Section VII.A.9(b)(2) of the draft permit requires the Applicant to have soil samples collected annually for each current and historical LMU. This provision tracks the requirement in 30 TAC § 321.42(k) that historical waste application fields must be sampled every year, regardless of whether

the Applicant eliminates them from the permit.

Special Provision X.N. requires the Applicant to maintain a map in the PPP that identifies the location of all historical LMUs and reads as follows: "A LMU map showing historical LMUs shall be maintained in the PPP." Fields no longer associated with the dairy facility (historical LMUs) may be used as third party fields as long as all requirements for land application on third party fields are met.

COMMENT 38:

Waco comments that draft permit fails to provide a meaningful definition of vegetative buffers. Waco recommends adding the following sentence to Section X.D.:

A vegetative buffer shall meet the criteria of Riparian Forest Buffers defined by NRCS Practice Code 391 or the criteria of Vegetative Filter Strips as defined by NRCS Practice Code 393.

RESPONSE 38:

30 TAC § 321.40(h) states: "Vegetative buffer strips shall be no less than 100 feet of vegetation to be maintained between manure, litter, or wastewater application areas and water in the state." Although not defined by TCEQ rules, vegetative buffers are commonly understood to mean vegetation that reduces shock due to contact. NRCS Practice Code 393 refers to Practice Code 391, *Riparian Forest Buffer*. Riparian forest buffers are areas predominantly in trees or shrubs located adjacent to and up-gradient from watercourses or water bodies. One of the purposes of a riparian forest buffer is to reduce excess amounts of sediments, organic material, nutrients, and pesticides in surface runoff. This purpose is the same as that performed by vegetative filter strips according to NRCS Practice Code 393. Citing the practice code is adequate for permit requirements. The practice standard has an adequate definition and the ED made no change in response to the comment.

COMMENT 39:

Waco is concerned about how the bacterial problems in the North Bosque Watershed are being addressed and recommends adding provisions to the draft permit that address the control of pathogens from the land application and irrigation operations.

RESPONSE 39:

40 CFR § 122.44(k)(3) allows states to use BMPs to control or abate discharges "when numeric effluent limitations are infeasible." This also applies to bacteria. In the case of North Bosque dairies, they are only authorized to discharge from an RCS in the event of a chronic or catastrophic rainfall event that exceeds the 25-year, 10-day storm event. The BMPs in place to limit the amount on nutrients applied to the LMUs also limit the amount of bacteria that can be applied. Therefore, bacteria applied to LMUs are limited by the BMPs that limit nutrient application. Additionally, as

long as land application follows the BMPs and NMP application rates, runoff from LMUs are considered non-point source discharges that are not regulated under the draft permit.

The requirements in the draft permit satisfy this requirement because the North Bosque River TMDLs are intended to achieve significant reductions in the annual average concentrations and total annual loading of soluble phosphorus in the river. The TMDLs are designed to do this by focusing on controlling soluble phosphorus loading and in-stream concentrations to protect designated uses. The management measures for controlling phosphorus loading will also have some corollary effect on reducing pathogen and bacteria loading, since non-point source nutrient and pathogen loads largely originate from the same sites and materials; and are transported via the same processes and pathways. Other provisions in the rules and draft permit directed at reducing and minimizing all pollutants, including pathogens and bacteria, that are potential constituents of animal wastes include:

1. Requiring a larger RCS with capacity to contain a designed 25-year, 10-day rainfall event (approximately 60% larger than required to contain the 25-year, 24-hour rainfall event);
2. Establishing an RCS management plan;
3. Controlling runoff from manure piles by covering, berming, or requiring that they drain into an RCS;
4. Setting additional minimum buffer distances between land application units and surface water in the state;
5. Prohibiting nighttime land application between 12 a.m. and 4 a.m.; and
6. Requiring a NMP that uses phosphorus transport considerations to determine allowable applications of nutrients. The phosphorus index approach reduces allowable application of nutrients to levels that are appropriate for reducing and minimizing all pollutants that are constituents of animal wastes.

COMMENT 40:

Waco comments that the draft permit should require the Applicant to report information to TCEQ on third party fields regarding soil testing, areas of application, and application rates. Waco also comments that the information should also be included in the annual report along with copies of contracts with applicable third party field operators, statements of compliance with permit requirements for the previous year, and a summary of discharges from third party fields or a statements that there has not been any discharge from a third party field. For example, Waco suggests adding the following phrase at the end of Section VII.8.(e)(5)(iv):

...a copy of any initial or annual soil analyses, land application locations, dates and times, and nutrient concentration of applied materials, rates, acreage of application areas, and crops and crop yields for the preceding quarter.

RESPONSE 40:

30 TAC § 321.42(j)) and section VII.A.8(e)(5)(iv) of the permit contain the requirements for land

application on third party fields in the North Bosque River watershed. It requires that records be maintained that contain the name, locations, and amounts of manure, litter, or wastewater transferred to operators of third party fields and requires that information be submitted to the appropriate TCEQ region office on a quarterly basis. See 30 TAC § 321.42(j)(4). Soil sample testing on third party fields must be included in the annual report due February 15th and submitted to TCEQ. See 30 TAC §§ 321.46(e)(1) and 321.42(j)(3).

30 TAC § 321.42(j)(1) requires a written contract between the CAFO dairy operator and the operator of a third party field; and any such contracts should be maintained in their PPP. 30 TAC § 321.46(d) specifies the requirements for recordkeeping at the CAFO. Records must be kept on site for a minimum of five years from the date the record was created and must submit them to TCEQ within five days of a request by the ED.

COMMENT 41:

Waco comments that the draft permit should clearly state that drainage or discharges of wastewater or manure from third party fields is prohibited. Waco also comments that the Applicant should be prohibited from any further use of third party fields if it is determined that the Applicant disposed of waste on a third party field when the most current soil test reflects phosphorus concentrations of over 200 ppm or if the application rate established by the permit for third party fields is ever exceeded.

RESPONSE 41:

The ED declines to make the suggested changes. Runoff from third party fields where waste is applied at agronomic rates is allowed under the Clean Water Act. Runoff from third party fields where waste is not applied at agronomic rates or applied using proper operational controls is already prohibited. In those instances, runoff would be an unauthorized discharge and subject to TCEQ enforcement action.

There is no basis in the CAFO rules for including a blanket prohibition against delivery of all waste to all third party fields based on a single violation on a single third party field. However, such land application when soil phosphorus is in excess of 200 ppm or land application in excess of the agronomic rate or established application rate would be a violation of the CAFO rules and subject the operator to enforcement action by TCEQ.

Changes made to the draft permit in response to public comment:

Page 1 of the permit and Attachment B were revised to show LMU #2 is 35 acres.

Added Special Provision X.Q. Grassed Waterways.

1. The permittee shall design, construct, and maintain grassed waterways around the relocated native stream bed on the south of the settling basin and RCS #1:

- a. The design and construction shall adhere to the capacity, velocity, width, side slopes, depth, drainage, outlets, vegetative establishment, and plans and specifications requirements as described in NRCS Practice Standard Code 412, as amended.
 - b. The grassed waterways shall be planted and maintained in permanent vegetation, such as Bermuda grass. The period for re-establishment of vegetation following maintenance activities is not a violation of this provision.
2. The permittee shall develop and implement an operation and maintenance plan for the grassed waterways in accordance with NRCS Practice Standard Code 412, as amended. The plan shall be kept in the PPP. The operation and maintenance plan shall include the following:
- a. The permittee shall inspect the grassed waterways weekly and within 24 hours after a one inch or greater rainfall event, in accordance with Section VII.A.10(a) of this permit. The inspection report shall document the presence of bare areas, erosion, ponding or puddling of water, and depressions or reduced vegetation density that may lead to erosion, ponding or puddling.
 - b. In the event that bare areas, erosion, ponding or puddling, depressions, or reduced vegetation density are documented in the inspection report, the permittee shall:
 - i. submit the inspection report to the TCEQ Regional Office within 5 days of the date of inspection, and
 - ii. implement corrective actions within 30 days of the inspection. In the event that corrective actions cannot be implemented within 30 days, the permittee shall document the factors delaying implementation of corrective actions and implement corrective actions as soon as possible.
 - iii. In conjunction with the five year evaluation required by Section VII.A.10(b) of this permit, a licensed Texas professional engineer must review NRCS Practice Standard Code 412, complete a site evaluation of the grassed waterway, and include their findings in the certified report.

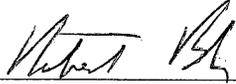
In response to comment, the date of the most recent NMP was added to Section V of the Fact Sheet.

Respectfully submitted,

Texas Commission on Environmental Quality

Mark R. Vickery, P.G.
Executive Director

Robert Martinez, Director
Environmental Law Division

By 

Robert D. Brush, Staff Attorney

Environmental Law Division

State Bar No. 00788772

Representing the EXECUTIVE DIRECTOR of
the Texas Commission on Environmental
Quality

CERTIFICATE OF SERVICE

I certify that on March 18, 2009 the "Executive Director's Response to Public Comments" for Permit No. WQ00032590000 was filed with the Texas Commission on Environmental Quality's Office of Chief Clerk.



Robert D. Brush, Staff Attorney
Environmental Law Division
State Bar No. 00788772