

1984 ——— 25 Years ——— 2009

Mr. Rochelle's Direct Line: (512) 322-5810
mrochelle@lglawfirm.com

ACR
61778

HR/OPA
MAY 19 2009

May 13, 2009

BY DM

RECEIVED VIA HAND DELIVERY

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle
Bldg. F – 1st Floor
Austin, Texas 78753

MAY 14 2009

OFFICE OF
PUBLIC ASSISTANCE

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
CHIEF CLERKS OFFICE
2009 MAY 18 AM 11:25

Re: Request for Hearing for Randy Earl Wyly/Wyly Dairy No. 1:
TPDES Permit No. WQ0003160000

Dear Ms. Castañuela:

Please accept this letter submitted on behalf of my client, the Bosque River Coalition (the "Coalition"), a Texas non-profit corporation, consisting of property owners in the vicinity of the above-referenced draft TPDES permit ("Draft Permit") for Randy Earl Wyly/Wyly Dairy No. 1 (hereinafter, the "Dairy" or "the applicant"). The purpose of this letter is to request a contested case hearing regarding the Draft Permit. The Coalition also hereby requests that it be placed on the mailing list so that it may remain informed on the status of the Draft Permit.

CONTESTED CASE HEARING REQUEST

Pursuant to specific requirements of a request for a contested case hearing under Sections 55.201, 55.203, 55.205 and 50.115 of Title 30 of the Texas Administrative Code ("TAC"), those same requirements being set forth in the April 13, 2009 Notice of the Executive Director's ("ED's") Decision on the Draft Permit, the Coalition offers the following:

Hearing Request Requirements

General Requirements

The Coalition hereby requests a contested case hearing. The applicant is Randy Earl Wyly/Wyly Dairy No. 1 and the Draft Permit is TPDES Permit No. WQ0003160000.

The Coalition is a Texas non-profit corporation represented by Martin Rochelle and Lauren Kalisek. Therefore, all communications should be directed to the undersigned at Lloyd Gosselink Rochelle & Townsend, P.C., 816 Congress Avenue, Suite 1900, Austin, Texas 78701, phone number (512) 322-5810, fax number (512) 472-0532.

mm

Requirements for a Group or Association

The Coalition was formed for the purpose of furthering the protection and enhancement of water quality in the Bosque River watershed. The Coalition seeks to protect the water quality of the Bosque River watershed—an interest germane to the organization's specific purpose. Neither the claim asserted nor the relief requested require the participation of individual members in this case. Members of the Coalition, as discussed below, qualify as affected persons and have standing in their own right to request a contested case hearing.

Requirements for an Affected Person

Mr. Chuck Markham is a member of the Coalition and owns property along an unnamed tributary of Duffau Creek, approximately 2.75 miles from the Dairy. Mr. Markham qualifies as an affected person under Section 55.203 of the TAC with a personal justiciable interest not common to the general public in that he owns property along a tributary downstream from the Dairy and into which discharges and runoff from the Dairy drain. Mr. Markham runs livestock on his property that are watered from the tributary, and he and his family also use the tributary for picnicking and recreation. Mr. Markham is concerned that the proposed discharge authorized by the Draft Permit, and resulting effects on water quality in the tributary of Duffan Creek, threaten the use and enjoyment of his property and the tributary. Please see the enclosed map at Attachment A for reference purposes.

Disputed Issues of Fact

The Coalition bases its request for hearing on the following disputed issues of fact. In accordance with Section 50.115(c) of the TAC, the issues set forth below are (1) disputed questions of fact; (2) were raised during the public comment period; and (3) are relevant and material to the decision on the application.

1. Whether retention control structures ("RCS") will be adequately designed, regulated and managed (Comment Nos. 1, 2, 3, 4, and 38).
2. Whether the settling basins and slurry ponds are properly designed, regulated, and certified to protect water quality (Comment Nos. 5, 6, 7, 8, and 9).
3. Whether the Draft Permit should require an annual determination of sludge accumulation (Comment No. 10).
4. Whether capacity certification and requirements for RCSs are properly described and established in the Draft Permit to ensure water quality is protected (Comment No. 11).
5. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit (Comment No. 12).
6. Whether liner and embankment certifications and testing specifications are adequate to ensure protection of water quality (Comment Nos. 13 and 15).

7. Whether certification of settling basins and slurry storage basins as concrete and structurally sound should be completed prior to permit issuance to ensure protection of water quality (Comment No. 14).
8. Whether an adequate description of structural controls exists in the Draft Permit (Comment No. 16).
9. Whether the Applicant has demonstrated adequate dewatering capacity (Comment No. 17).
10. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected (Comment Nos. 18 and 19).
11. Whether structural controls should be certified prior to permit issuance to ensure that water quality is protected (Comment No. 20).
12. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality (Comment No. 21).
13. Whether the Draft Permit properly manages phosphorus production (Comment No. 22).
14. Whether removal of solid manure under the Draft Permit is adequate to meet water quality requirements for the North Bosque watershed (Comment No. 23).
15. Whether land management units ("LMUs") are properly sized and identified (Comment Nos. 25 and 39).
16. Whether the Applicant's projected crop yields are reasonable (Comment No. 26).
17. Whether the NMP adequately identifies sampling locations and timing (Comment Nos. 27 and 37).
18. Whether agronomic rates are properly calculated in the NMP (Comment No. 28).
19. Whether waste and wastewater application to fields exceeding 200 ppm phosphorus by the Applicant will negatively affect water quality (Comment No. 29).
20. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality (Comment No. 30).
21. Whether the Draft Permit provisions regarding regulation and monitoring of third party fields are adequate to protect water quality (Comment No. 30).
22. Whether sludge should be applied to third-party fields (Comment No. 31).
23. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year (Comment No. 32).
24. Whether the historical waste application fields should be identified in the application or the Draft Permit (Comment No. 33).
25. Whether the Draft Permit provides a meaningful definition of vegetative buffers (Comment No. 34).
26. Whether the appropriate method for delineating the vegetative buffer and filter strip boundaries should be included in the Draft Permit (Comment No. 35).
27. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards (Comment No. 36).
28. Whether the Draft Permit establishes adequate reporting requirements for third party fields (Comment No. 40).

Ms. LaDonna Castañuela
May 13, 2009
Page 4

29. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields (Comment No. 41).

Based upon the foregoing, the Coalition hereby requests a contested case hearing and requests that a hearing be designated to determine compliance with Texas Surface Water Quality Standards, 30 TAC Chapter 307 and concentrated animal feeding operation requirements, 30 TAC Chapter 321. I appreciate your consideration of these comments and the contested case hearing request as well as the Coalition's request to be maintained on the mailing list of the above-referenced Draft Permit. If you have any questions or concerns, do not hesitate to contact me or Lauren Kalisek at (512) 322-5847.

Sincerely,

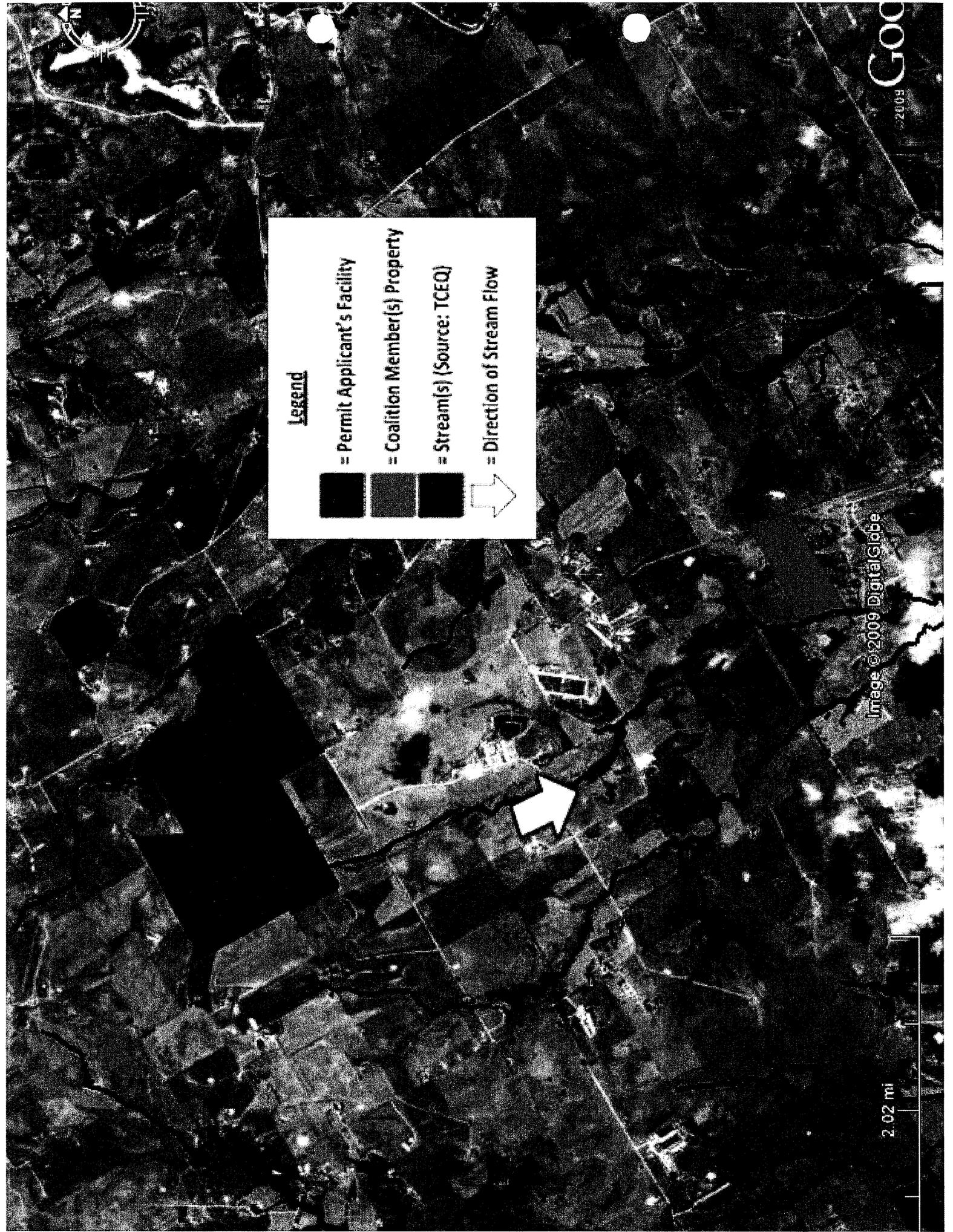


Martin C. Rochelle

MCR/ldp
2402\04\090512

ENCLOSURES

cc: Attached Mailing List (via regular mail)



Legend

-  = Permit Applicant's Facility
-  = Coalition Member(s) Property
-  = Stream(s) (Source: TCEQ)
-  = Direction of Stream Flow

Image © 2009 DigitalGlobe

2.02 mi

GOO
E0102

MAILING LIST
for
Randy Earl Wyly
TPDES Permit No. WQ0003160000

FOR THE APPLICANT:

Randy Earl Wyly
3502 County Road 209
Hico, Texas 76457

Norman Mullin, P.E.
Enviro-Ag Engineering, Inc.
3404 Airway Boulevard
Amarillo, Texas 79118

PROTESTANTS/INTERESTED PERSONS:

Martin C. Rochelle, Attorney
Lloyd Gosselink
816 Congress Avenue, Suite 1900
Austin, Texas 78701

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Michael T. Parr, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087

Maria Snodgrass, Technical Staff
Texas Commission on Environmental Quality
Water Quality Division MC-150
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

1984 *25 Years* 2009

Mr. Rochelle's Direct Line: (512) 322-5810
mrochelle@lglawfirm.com

AGR
61778

May 13, 2009

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle
Bldg. F - 1st Floor
Austin, Texas 78753

VIA HAND DELIVERY

OPA

H

MAY 14 2009

BY *[Signature]*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
CHIEF CLERKS OFFICE
MAY 13 PM 2:53

Re: Request for Hearing for Randy Earl Wyly/Wyly Dairy No. 1:
TPDES Permit No. WQ0003160000

Dear Ms. Castañuela:

Please accept this letter submitted on behalf of my client, the Bosque River Coalition (the "Coalition"), a Texas non-profit corporation, consisting of property owners in the vicinity of the above-referenced draft TPDES permit ("Draft Permit") for Randy Earl Wyly/Wyly Dairy No. 1 (hereinafter, the "Dairy" or "the applicant"). The purpose of this letter is to request a contested case hearing regarding the Draft Permit. The Coalition also hereby requests that it be placed on the mailing list so that it may remain informed on the status of the Draft Permit.

CONTESTED CASE HEARING REQUEST

Pursuant to specific requirements of a request for a contested case hearing under Sections 55.201, 55.203, 55.205 and 50.115 of Title 30 of the Texas Administrative Code ("TAC"), those same requirements being set forth in the April 13, 2009 Notice of the Executive Director's ("ED's") Decision on the Draft Permit, the Coalition offers the following:

Hearing Request Requirements

General Requirements

The Coalition hereby requests a contested case hearing. The applicant is Randy Earl Wyly/Wyly Dairy No. 1 and the Draft Permit is TPDES Permit No. WQ0003160000.

The Coalition is a Texas non-profit corporation represented by Martin Rochelle and Lauren Kalisek. Therefore, all communications should be directed to the undersigned at Lloyd Gosselink Rochelle & Townsend, P.C., 816 Congress Avenue, Suite 1900, Austin, Texas 78701, phone number (512) 322-5810, fax number (512) 472-0532.

Requirements for a Group or Association

The Coalition was formed for the purpose of furthering the protection and enhancement of water quality in the Bosque River watershed. The Coalition seeks to protect the water quality of the Bosque River watershed—an interest germane to the organization's specific purpose. Neither the claim asserted nor the relief requested require the participation of individual members in this case. Members of the Coalition, as discussed below, qualify as affected persons and have standing in their own right to request a contested case hearing.

Requirements for an Affected Person

Mr. Chuck Markham is a member of the Coalition and owns property along an unnamed tributary of Duffau Creek, approximately 2.75 miles from the Dairy. Mr. Markham qualifies as an affected person under Section 55.203 of the TAC with a personal justiciable interest not common to the general public in that he owns property along a tributary downstream from the Dairy and into which discharges and runoff from the Dairy drain. Mr. Markham runs livestock on his property that are watered from the tributary, and he and his family also use the tributary for picnicking and recreation. Mr. Markham is concerned that the proposed discharge authorized by the Draft Permit, and resulting effects on water quality in the tributary of Duffan Creek, threaten the use and enjoyment of his property and the tributary. Please see the enclosed map at Attachment A for reference purposes.

Disputed Issues of Fact

The Coalition bases its request for hearing on the following disputed issues of fact. In accordance with Section 50.115(c) of the TAC, the issues set forth below are (1) disputed questions of fact; (2) were raised during the public comment period; and (3) are relevant and material to the decision on the application.

1. Whether retention control structures ("RCS") will be adequately designed, regulated and managed (Comment Nos. 1, 2, 3, 4, and 38).
2. Whether the settling basins and slurry ponds are properly designed, regulated, and certified to protect water quality (Comment Nos. 5, 6, 7, 8, and 9).
3. Whether the Draft Permit should require an annual determination of sludge accumulation (Comment No. 10).
4. Whether capacity certification and requirements for RCSs are properly described and established in the Draft Permit to ensure water quality is protected (Comment No. 11).
5. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit (Comment No. 12).
6. Whether liner and embankment certifications and testing specifications are adequate to ensure protection of water quality (Comment Nos. 13 and 15).

7. Whether certification of settling basins and slurry storage basins as concrete and structurally sound should be completed prior to permit issuance to ensure protection of water quality (Comment No. 14).
8. Whether an adequate description of structural controls exists in the Draft Permit (Comment No. 16).
9. Whether the Applicant has demonstrated adequate dewatering capacity (Comment No. 17).
10. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected (Comment Nos. 18 and 19).
11. Whether structural controls should be certified prior to permit issuance to ensure that water quality is protected (Comment No. 20).
12. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality (Comment No. 21).
13. Whether the Draft Permit properly manages phosphorus production (Comment No. 22).
14. Whether removal of solid manure under the Draft Permit is adequate to meet water quality requirements for the North Bosque watershed (Comment No. 23).
15. Whether land management units ("LMUs") are properly sized and identified (Comment Nos. 25 and 39).
16. Whether the Applicant's projected crop yields are reasonable (Comment No. 26).
17. Whether the NMP adequately identifies sampling locations and timing (Comment Nos. 27 and 37).
18. Whether agronomic rates are properly calculated in the NMP (Comment No. 28).
19. Whether waste and wastewater application to fields exceeding 200 ppm phosphorus by the Applicant will negatively affect water quality (Comment No. 29).
20. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality (Comment No. 30).
21. Whether the Draft Permit provisions regarding regulation and monitoring of third party fields are adequate to protect water quality (Comment No. 30).
22. Whether sludge should be applied to third-party fields (Comment No. 31).
23. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year (Comment No. 32).
24. Whether the historical waste application fields should be identified in the application or the Draft Permit (Comment No. 33).
25. Whether the Draft Permit provides a meaningful definition of vegetative buffers (Comment No. 34).
26. Whether the appropriate method for delineating the vegetative buffer and filter strip boundaries should be included in the Draft Permit (Comment No. 35).
27. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards (Comment No. 36).
28. Whether the Draft Permit establishes adequate reporting requirements for third party fields (Comment No. 40).

Ms. LaDonna Castañuela

May 13, 2009

Page 4

29. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields (Comment No. 41).

Based upon the foregoing, the Coalition hereby requests a contested case hearing and requests that a hearing be designated to determine compliance with Texas Surface Water Quality Standards, 30 TAC Chapter 307 and concentrated animal feeding operation requirements, 30 TAC Chapter 321. I appreciate your consideration of these comments and the contested case hearing request as well as the Coalition's request to be maintained on the mailing list of the above-referenced Draft Permit. If you have any questions or concerns, do not hesitate to contact me or Lauren Kalisek at (512) 322-5847.

Sincerely,



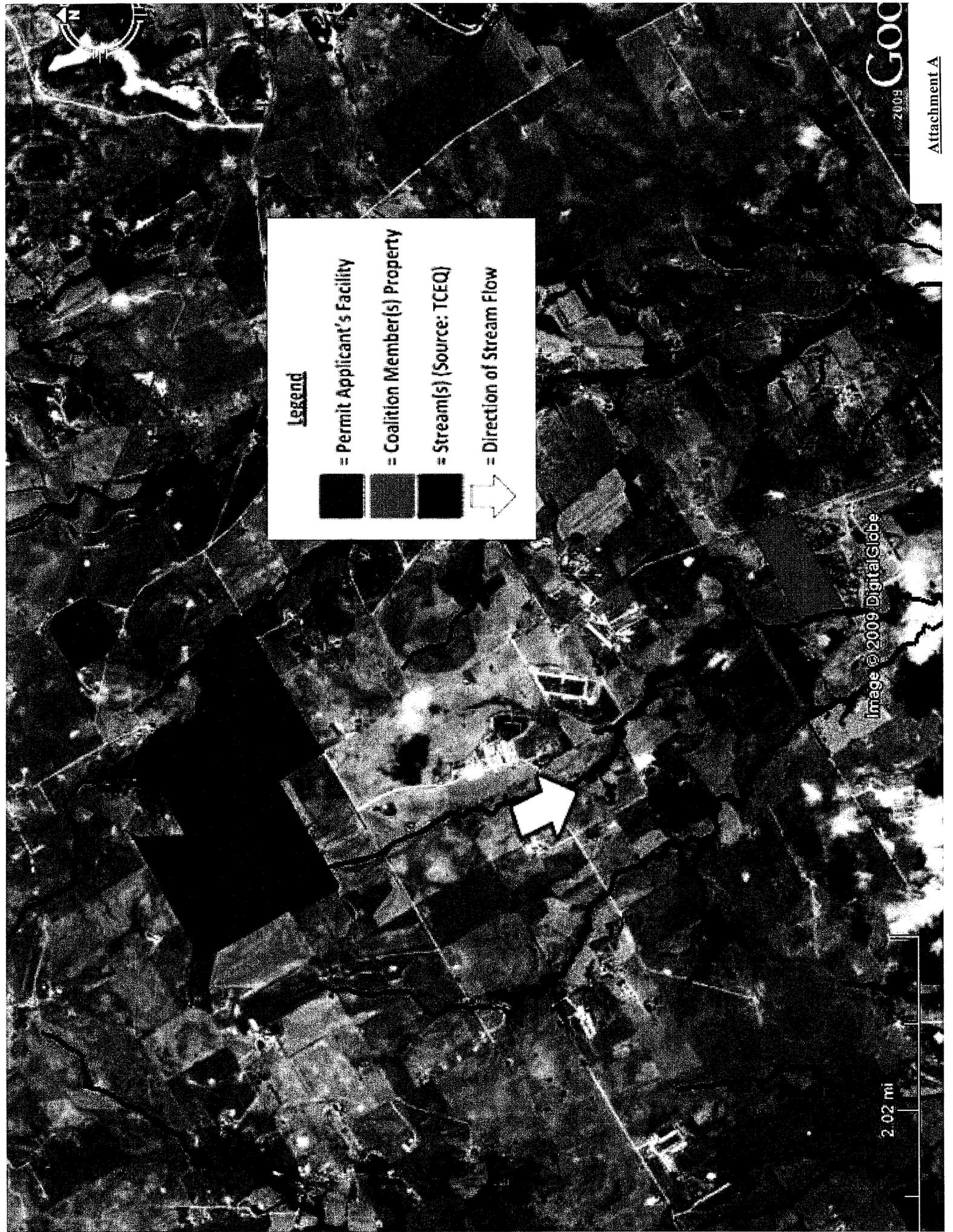
Martin C. Rochelle

MCR/ldp

2402\04\090512

ENCLOSURES

cc: Attached Mailing List (via regular mail)



Legend

-  = Permit Applicant's Facility
-  = Coalition Member(s) Property
-  = Stream(s) (Source: TCEQ)
-  = Direction of Stream Flow

Image © 2009 DigitalGlobe

2.02 mi

GOC
FOI# 22109

MAILING LIST
for
Randy Earl Wylly
TPDES Permit No. WQ0003160000

FOR THE APPLICANT:

Randy Earl Wylly
3502 County Road 209
Hico, Texas 76457

Norman Mullin, P.E.
Enviro-Ag Engineering, Inc.
3404 Airway Boulevard
Amarillo, Texas 79118

PROTESTANTS/INTERESTED PERSONS:

Martin C. Rochelle, Attorney
Lloyd Gosselink
816 Congress Avenue, Suite 1900
Austin, Texas 78701

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Michael T. Parr, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087

Maria Snodgrass, Technical Staff
Texas Commission on Environmental Quality
Water Quality Division MC-150
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

AGP
61778

Mr. Rochelle's Direct Line: (512) 322-5810
mrochelle@lglawfirm.com

OPA

October 24, 2008

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
12100 Park 35 Circle
Bldg. F – 1st Floor
Austin, Texas 78753

BY VIA HAND DELIVERY

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 OCT 24 PM 2:54
CHIEF CLERKS OFFICE

Re: Comments on Draft Permit for Randy Earl Wyly/Wyly Dairy No. 1:
TPDES Permit No. WQ0003160000 (2402-04)

Dear Ms. Castañuela:

Please accept these written comments on behalf of my client, the City of Waco ("City"), concerning the above-referenced draft TPDES permit ("Draft Permit") for Randy Earl Wyly/Wyly Dairy No. 1 (hereinafter, "Wyly Dairy" or "the applicant"). Please feel free to contact me at my law firm, Lloyd Gosselink Rochelle & Townsend, P.C., 816 Congress Avenue, Suite 1900, Austin, Texas 78701, phone number (512) 322-5810, fax number (512) 472-0532, concerning any aspect of these comments or the Commission's responses to same.

WRITTEN COMMENTS

The City appreciates the Commission's preparation of the Draft Permit and this opportunity to provide comments, and it hereby provides several comments to the terms and conditions of the Draft Permit, as follows:

The City of Waco hereby requests that the Executive Director consider these comments in evaluating the Draft Permit which has been proposed for Wyly Dairy. The City appreciates the opportunity to submit these comments and the consideration it hopes the Executive Director and Commission staff will give to them.

1. Calculation of Runoff from Design Rainfall Event

The applicant's capacity survey, conducted on July 17, 2008, indicates that the existing retention control structures ("RCSs") have a combined capacity of 48.13 acre-feet and a combined surface area of 7.16 acres. Following the modifications proposed in the application, however, the RCSs will have a combined capacity of 59.59 acre-feet (an increase of 11.46 acre-feet or 23.8 percent) and a surface area of 7.61 acres (an increase of 0.45 acre or 6.3 percent). This surface area increase seems a little low since the embankments will be raised four feet and will still need to maintain a stable slope. Because the applicant provided no proposed stage-

MW

volume-surface area table or drawings of the expanded RCSs in the application, however, it is difficult to know for sure. The City is concerned about this potential underestimation of surface area because, if the proposed surface area is incorrect, the runoff volume will be incorrect. In an effort to provide the applicant with an opportunity to justify its runoff calculations, the TCEQ should seek from the applicant drawings and a stage-volume-surface area table of the proposed RCSs.

Additionally, the runoff control area contains two concrete settling basins that do not appear to have been included in the runoff calculations. The area of these basins appears to be one-half of an acre or larger. Of course, concrete settling basins provide impervious cover. The exclusion of these impervious areas from the factors used to calculate runoff further supports the likelihood that the volume of runoff from the design rainfall event is underestimated in the application, which ultimately means that the RCSs will not be large enough to capture the design rainfall event.

2. Factoring RCS Surface Areas in the Stage/Storage Table of the RCS Management Plan

The surface area of an RCS is a critical component of any reliable calculation regarding the effect of evaporation on the monthly water balance, and thus overall structure capacity. Draft Permit Provision VII.A.5(a)(2)(iv), however, does not require that this information—the surface area for each one-foot of depth in the RCS—be provided. Instead, the provision requires the applicant to compile a stage/storage table that shows only storage *volume* for each foot of depth. Without considering a stage/surface area table based on the average surface area during each month of operation, there is no reliable method of calculating RCS evaporation. This means that the TCEQ will have a difficult time making an objective determination regarding whether the applicant's RCS Management Plan is based on reliable assumptions. The City believes that Draft Permit Provision 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.”

3. RCS Management Plan for Existing RCSs

The Draft Permit does not appear to require an RCS Management Plan for the existing RCSs. Since the existing RCSs will be used by the applicant until construction of the modified RCS is completed, the absence of any RCS Management Plan requirement for the existing RCSs would seem inconsistent with Title 30, Section 321.42(g) of the Texas Administrative Code, which requires, without exception, an RCS Management Plan for all RCSs.

4. RCS Management Plan for Modified RCSs

The Draft Permit requires an RCS Management Plan to be prepared and placed in the pollution prevention plan after the RCS is modified. However, under the Draft Permit there is no

opportunity for any meaningful review of this plan before the permit is issued or even before it is implemented after the permit is issued. The water balance and RCS Management Plan are an integral part of properly sizing each RCS. Without an RCS Management Plan to draw upon, any water balance calculation has marginal utility.

Under the current Draft Permit, the only time the RCS Management Plan will be subject to review is when field inspectors conduct annual inspections. As a practical matter, field inspectors will likely not have sufficient time, and in some instances, perhaps, the requisite engineering expertise, to properly evaluate the plan. At a minimum, the City would encourage the TCEQ to consider revising the Draft Permit so that the RCS Management Plan would have to be submitted to the TCEQ permitting staff for review and approval. The City is concerned that without even this level of review, the RCS Management Plan—which is critical to the proper operation of this facility—might never be subject to any meaningful scrutiny.

5. Sludge Accumulation Rate from Open Lot Runoff

The applicant has calculated the sludge accumulation volume resulting from runoff based on 25 percent of the runoff from the 25-year 10-day rainfall event, but it has provided no technical justification or historical support for this value. It is important to recognize that all runoff events that occur at the facility will cause some portion of the manure to enter the lagoon and that, over time, will lead to sludge accumulation.

The City requests that the Draft Permit be revised to require the applicant to conduct an annual measurement of the sludge accumulation. This simple revision to the Draft Permit would adequately address the City's concern with respect to this comment.

6. Regulation of Settling Basins and Slurry Storage Pond as Retention Control Structures

Title 30, Section 321.32(47) of the Texas Administrative Code defines an RCS as “any basins, ponds, pits, tanks, conveyances, and lagoons used to store and/or treat manure, litter, wastewater, and sludge.” The primary function of these structures is to separate manure and other solids from the water in which such solids would be suspended. RCSs are, therefore, used to treat that wastewater and also to store the settled manure and solids after separation. The USDA certainly regards these settling basins as treatment structures in its Agricultural Waste Management Field Handbook (Chapter 10) (651.1004). In addition, the slurry storage pond is clearly storing manure, thus bringing it under the definition of an RCS under TCEQ rules.

Draft Permit Provision VII.A.3(a), however, fails to require capacity certifications for the settling basins and slurry storage pond as is required of all RCSs. For a settling basin to function correctly, it must be properly sized. No design specifications and completed construction specifications certified by a licensed Texas professional engineer have been provided for the settling basins as required by the rules for RCSs. Since the slurry pond must be large enough to

prevent overflow (see Special Provision X.G.3), it must be properly sized to contain runoff during a 25-year 10-day rainfall event. No design specifications and completed construction specifications certified by a licensed Texas professional engineer have been provided for the slurry storage pond as required by the rules for RCSs. The City encourages the TCEQ to address this inconsistency with TCEQ rules by revising the Draft Permit to require the applicant to produce capacity certifications for the settling basins and the slurry storage pond.

7. **Designation of Concrete Basin No. 2 as a Settling Basin**

The Site Map (Attachment A) in the Draft Permit shows the presence of a Concrete Basin No. 2. It would seem more appropriate and consistent to designate this structure as a settling basin (similar to Concrete Settling Basin No. 1) so that there is no confusion about whether it is subject to settling basin requirements.

8. **Absence of Concrete Settling Basin No. 1 on Flow Chart**

The flow chart in the supplement to the application¹ shows runoff from the open lot and adjacent area flowing directly to RCS No. 2. Settling Basin No. 1, however, is not referenced on the chart. Settling Basin No. 1 should be included in the flow chart unless it has been removed by the applicant. If this is the case, then both the site map and sludge calculations should be revised.

9. **Schedule for Solids Removal in Settling Ponds**

Draft Permit Provision X.O. requires that the solids in the settling basin be removed on a “regular and consistent basis so as to assure attainment of the 50% designed removal efficiency.” The applicant, however, has provided no design information that would appear to justify this removal efficiency. The Midwest Plan Service Structures and Environment Handbook referred to by the applicant recommends removing solids after every major rainfall event, or 3 to 4 times a year, depending on the type of settling basin. Given the applicant's reliance on the removal efficiencies described in this handbook, and given the importance of removing solids to maintain the removal efficiency of the settling basin, the City believes a provision consistent with these recommendations should be added to the Draft Permit: “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.”

10. **Designation of Solids from the Settling Basin**

Draft Permit Provision X.H.1 states that “for the purpose of this permit, settling basin solids from the concrete settling pond shall be defined as manure.” In Draft Permit Provision X.H.2, however, the TCEQ appears to recognize that settling basin solids are in fact different

¹ Figure 2.1, page 7; (6/12/08).

than manure by requiring settled solids to be sampled separately. Title 30, Section 321.32(49) of the Texas Administrative Code defines sludge as a “solid, semi-solid, or slurry waste generated during the treatment of and/or storage of any wastewater. The term includes material resulting from treatment, coagulation, or sedimentation of waste in a retention control structure.” Without question, settling basin solids are “materials resulting from . . . sedimentation of waste in a retention control structure.” As a consequence, concrete settling basin solids should be correctly defined as sludge and Draft Permit Provision X.H.1 should be rewritten to reflect this, or it should be removed from the Draft Permit entirely.

11. Monitoring of Sludge Accumulation

The buildup of sludge is one of the most common causes of diminished capacity in an RCS, but the Draft Permit does not require measurement of the sludge volume in the lagoons until three years after the date of permit issuance. This is an inordinate amount of time to pass before these measurements are required. The City would recommend that the Draft Permit be revised to require that the sludge accumulation be measured on an annual basis beginning at the end of the first year of operation, should the permit ultimately be issued.

12. Description of Capacity Certifications and Requirements

The permit language for the required RCS capacity certification under Draft Permit Provision VII.A.3(a)(2) should make clear that all capacity certifications should include both total as-built capacity and the remaining capacity resulting from sludge accumulation. The City recommends revising this provision 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.” Otherwise, the capacity certifications are ambiguous. For example, in the July 17, 2007 capacity survey for RCS No. 1 and RCS No. 2, there is nothing to indicate whether the reported values are for the as-built capacity or the balance of capacity after sludge accumulation. If there is no sludge accumulation, the certification should so state.

13. Extensions to the RCS Compliance Schedule

The compliance schedule in Draft Permit Provision X.A.2 allows CAFOs to obtain multiple extensions to the deadline for completing RCS modifications. To address this loophole, the City recommends that a list of specific circumstances be added to the Draft Permit that would serve as grounds for an extension (*e.g.*, a documented period of extended bad weather).

14. Liner Certifications for RCS No. 1 and RCS No. 2

It appears that the liner certifications for RCS No. 1 and RCS No. 2 were based on only two samples taken in each RCS. In addition, the certifications do not indicate the location of the samples. Without a demonstration by the applicant that samples were taken in both the embankments as well as the bottom of each RCS, it is difficult to see how the applicant can

demonstrate that the RCSs are sufficiently lined to prevent leakage. Additionally, it does not appear that the applicant took the minimum number of samples required by the TCEQ. Before the permit is issued, proper certification should be performed verifying that both the embankments and bottom of the RCS meet criteria and showing the location of the samples.

15. Certification of Settling Basins and Storage Basins As Concrete and Structurally Sound

The applicant's settling basins and the slurry storage basins are required to be certified as having no hydrologic connection to waters of the state or that no significant leakage will occur based on demonstrated evidence. No such certifications have been provided for the settling basins or slurry storage basins in the application upon which the Draft Permit is based, however. While the applicant has indicated that the settling basins and slurry storage basins are made of concrete, there is no certification demonstrating this, nor is there any certification that demonstrates these concrete ponds are free of leaks. Assuming that the basins are constructed completely of concrete, there still should be some certification made that they each are structurally sound, have no cracks, and are free of leaks. The City would encourage the TCEQ to require, prior to issuance of the permit, that all basins should be certified by a professional engineer as having competent liners or otherwise being constructed of concrete without any cracks or leaks.

16. Liner Testing Specifications

In previous CAFO permits in the Bosque watershed, the TCEQ has recently 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 a liner. In the Draft Permit, however, the TCEQ has reduced the number of samples by requiring one sample per acre of surface area to be distributed between the sidewalls and floor. The City believes that the sampling requirements in the recent Draft Permits should be incorporated into the Draft Permit.

17. Embankment Testing Specifications

Title 30, Section 321.38(g) of the Texas Administrative Code requires the Draft Permit to identify the required design specifications for all RCSs, including procedures and minimum requirements for liner and embankment testing. The City commends the TCEQ for adding Draft Permit Provision VII.A.3(g)(4) concerning Liner Sampling and Analysis with the reservations stated in the previous comment.

While this addresses concerns of the City related to liner testing, however, it does not address the City's concerns related to testing of embankment construction. Specifically, in Draft Permit Provision VII.A.3(f)(4) related to compaction testing, the City would encourage the TCEQ to consider 1) requiring that the field density tests be based on predetermined moisture-

density compaction curves, 2) defining the frequency of testing (*e.g.*, number of tests per specific area per lift), 3) requiring compaction testing on each lift during the construction of the liner (not on the last lift after completion of the liner), 4) requiring documentation of compaction test locations and results to be provided to the TCEQ, and 5) requiring continuous on-site inspection during construction.

The integrity of RCS embankments is critical to the protection of public welfare. An embankment failure could easily have catastrophic consequences not only with respect to water quality but also to human life. There is no reason to believe that simply providing a certification from a Licensed Professional Engineer can substitute for review of the supporting information by the TCEQ. The TCEQ should review the compaction testing results to make an independent verification of the certification.

18. Description of Structural Controls

The Site Map of the production area² provides an outline of the drainage areas but does not provide an adequate description of structural controls, particularly with respect to the berms. The map shows the location of berms and ditches surrounding the RCS drainage area with a dashed line, but no information has been provided regarding the size of the berms and ditches (*i.e.*, the width, height, depth). It fails to even distinguish berms from ditches.

The berms and ditches are an integral part of the facility, needed to prevent contaminated runoff from leaving the site. An inspector can observe whether berms and ditches are actually present and can judge the height, depth and width of a berm or ditch, but the inspector, may not in all circumstances have the technical expertise to determine whether they are sufficient to contain flows. The inspector certainly could not do this without performing the necessary surveying and making the necessary engineering calculations first, something that is unlikely to happen in the field. Therefore, some means must be given to the inspector to evaluate compliance. Additionally, if the operators are not given an adequate description of structural controls, the operators will not be able to determine their own compliance and how to make repairs if, for example, a berm deteriorates over time as a result of settling, some action of a careless worker, or runoff erosion. Simply pushing up a few inches of uncompacted dirt with a tractor blade is usually not adequate. The permit application and the Draft Permit should describe these berms in sufficient detail with respect to location, size, and construction method so that TCEQ inspectors can determine if the facility is in compliance and so that the operator can make adequate repairs when necessary.

19. Adequacy of Dewatering Capability

The applicant has indicated that it has a dewatering capacity of 250 gpm with its walking big gun and 400 gpm with its center pivot system. However, nothing in the application

² Draft Permit, Attachment A.

demonstrates that this dewatering capacity is adequate. Additionally, there is no information in the application that would demonstrate the validity of capacities listed (e.g., the pump models, horsepower, and dynamic head for the applicable pumping systems). The stated pumping capacity is more than likely a rated flow and does not take into account head losses in the piping and irrigation nozzles. Because Title 30, Section 321.38(f) requires that “[a]n irrigation system or other liquid removal system used by an AFO must be designed to ensure that the system is capable of dewatering the RCSs on a regular schedule,” the applicant should produce design information in the application that demonstrates it actually has the dewatering capacities claimed. The City would encourage the TCEQ to verify the capabilities of the dewatering equipment listed in the application by requesting the necessary information to determine the actual delivery rate of this equipment and how it is designed and operated.

20. Annual Facility Inspection Report

Draft Permit Provision VII.A.10(a)(5) requires an annual site inspection. However, this provision does not require a report of the findings to be prepared and sent to the TCEQ as required by Title 30, Sections 321.46(c)(2) and (e)(2). The requirement to send this report to TCEQ’s Office of Enforcement and Compliance should be added to Draft Permit Provision VII.A.10(a)(5).

21. Five-Year Evaluation

Draft Permit Provision VII.A.10(b) requires the Five-Year Evaluation to be kept in the PPP. However, this provision does not require it to be sent to TCEQ as required by Title 30, Section 321.46(e)(2). The requirement to send this report to TCEQ’s Office of Enforcement and Compliance should be added to Draft Permit Provision VII.A.10(b).

22. Certification of the Adequacy of Structural Controls

The Five-Year Evaluation required by Draft Permit Provision VII.A.10(b) requires that a licensed Texas professional engineer review the existing engineering documentation, complete a site evaluation of the structural controls, review existing liner documentation, and complete and certify a report of his or her findings. However, it does not require the engineer to certify that the controls are adequate to prevent unauthorized discharges. The City is concerned that the mere fact a report of findings was prepared might lead to the incorrect conclusion that the controls were adequate. For example, the engineer might certify that berms were present that were 9 inches in height. This would not, however, provide any information as to whether the berms were adequate. The City suggests that the Draft Permit be revised to clarify that the certification that is required under Provision VII.A.10(b) is not a certification of adequacy. In addition, the City would request that a certification of adequacy be required.

23. Clarification Regarding Certification of Structural Controls

Draft Permit Provision X.P. requires that all berms and any other runoff control structures be constructed and certified by a professional engineer prior to use of the RCS. Since the RCSs are already in use, this certification should take place prior to or immediately upon issuance of the permit. The provision should be revised to indicate this.

24. Sampling of Wastewater and Manure

Under the Draft Permit, only one annual sample is required to be collected for wastewater, “dry” manure, slurry, and settling basin solids. These single samples, if not representative, could drastically misrepresent the levels of phosphorus loading to any given field, as the entire NMP and future application to third-party fields are based on the results of these samples. Thus, the dependability of the samples themselves is extremely important in making reliable calculations of phosphorous loading. And how reliable the samples are for these purposes depends greatly on the methods employed in harvesting the samples themselves.

The practice condoned under the Draft Permit allows wastewater to be sampled from the surface of each RCS. Taking a sample from the surface of a quiescent RCS, however, will almost always result in a significantly different sampling concentration than if the sample had been harvested from the irrigation pipeline. The explanation for this discrepancy is simple: when irrigation pumps are drawing retained wastewater from the RCS, the currents created from the suction of water into the pipe agitate the accumulated sludges in the bottom of the RCS—a material highly concentrated in phosphorous—which then becomes mixed with the wastewater. Since this sludge contains high levels of phosphorus, the wastewater that is actually being used to irrigate the fields contains much higher levels of phosphorus than would be evident in a sample harvested from the surface of the RCS. This substantial discrepancy raises significant reliability questions regarding the assumptions used in the NMP. Additionally, the concentration of phosphorus in the RCS varies according to the antecedent rainfall or drought conditions which may cause varying degrees of dilution or concentration. Quite simply, if the purpose of the RCS annual sampling is to provide a reliable measure of phosphorous loading, then RCS samples should be obtained from the irrigation pipeline following the pump rather than from the surface of the RCS.

To that end, a simple way to provide even more reliable information regarding phosphorous loading is to take RCS samples more often than once per year. By comparison, wastewater treatment plants typically take samples weekly and often daily. There is no practical reason why one sample per irrigation event (which may often last for several days) should not be required. Even requiring one sample per week or month (when irrigating) would drastically enhance the reliability of collected data. But to clarify, the City is not advocating updating the NMP after every irrigation event. An average of the sampling events over the year could be used to update the NMP.

Similar reliability issues arise with sampling measures for manure, slurry, settling basin solids, and onsite sludge. Likewise, by revising the Draft Permit to require more than one annual sample of these materials be conducted (preferably one each month or one from each transport event), the TCEQ would be providing for the collection of a much more reliable set of data with only *de minimis* impact on the operator. To the contrary, as with RCS sampling, taking only annual samples from these solids can result in significant miscalculations of the amounts of nutrients applied to the land. Moisture content plays an important role in calculating the amount of applied nutrients, making the timing of the sampling important as well. If the solids are sampled while having a high moisture content and then applied much later when they have a much lower moisture content, the calculated nutrient application rate will be significantly underestimated. A requirement similar to Special Provision X.M for offsite sludge, which requires an analysis for each haul-off, should be required for manure, slurry, settling basin solids, and onsite sludge.

25. Phosphorus Production Management

The manure production tables in the application indicate that the total phosphorus produced by the proposed 3,000 cows will be 1,168 lb/day P₂O₅. This is equivalent to 426,320 lb/year P₂O₅ (1,168 x 365). The NMP (dated June 11, 2008) indicates that the amount of phosphorus to be applied to the LMUs or third-party fields is only 191,065 lb/year P₂O₅ (173,021 from solids + 18,044 from effluent), leaving 235,255 lb/year P₂O₅ or 55.2 percent of the generated phosphorus wholly unaccounted for. This “missing” phosphorus in the applicant's calculations further demonstrates that the wastewater and manure sampling is not representative and provides, instead, an unreliable measure for managing phosphorous loads, as described in the previous comment.

26. Removal of the Solid Manure from the Watershed

The TMDL for the North Bosque watershed recommends removal of 50 percent of the manure in order to meet the water quality goals. Based on the CDM Erath County Animal Waste Management Study performed for BRA in September 1998, along with the SWAT modeling that was done in support of this TMDL, 50 percent of the solid manure (38.1 percent of the total manure production) was assumed to be removed from the watershed. From a big picture perspective, if this manure is not removed from the watershed, the water quality modeling shows that the water quality goal will not be met. While the Draft Permit provides the applicant with several manure disposal options, it still allows 100 percent of the manure to be applied in the watershed. With the significant amount of waste that will be generated among the proposed 3,000 cows, it would seem most prudent to require some percentage—if not the full 50 percent—of generated waste to be managed outside of the watershed. Otherwise, the TCEQ is left with shifting perhaps a disproportionate burden of waste transport on to subsequent CAFO permit applicants in the North Bosque if TMDL goal attainment is the focus. Based on the latest NMP submitted in the application, the applicant is proposing to apply 43 percent of its total manure production onsite and 57 percent of its total manure production offsite, presumably to third-party

fields within the Bosque watershed. The City would recommend that the Draft Permit be revised to require that up to 50 percent 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.

27. NMP Implementation

Draft Permit Provision VII.A.8(a) indicates that the NMP submitted in the application shall be implemented upon issuance of the permit. However, multiple NMPs have been submitted for this proposed facility, and the Draft Permit does not make clear which one is applicable and should be reviewed. Unlike many of the individual permits issued in the North Bosque River watershed, this Draft Permit does not contain the date of the NMP to be implemented. The City recommends that the Draft Permit be revised to indicate the date of the NMP so that it is clear which NMP this facility will operate under for the year following permit issuance.

28. Limiting LMU Size

Texas NRCS Code 590 requires sampling to be conducted in accordance with Texas A&M University ("TAMU") guidance.³ According to TAMU guidance and the NRCS/TAMU NMP certification course, LMUs are required to be 40 acres or less in size. Six of the applicant's LMUs, however, exceed this threshold. Specifically, LMU No. 1 measures 55 acres in size. LMU No. 3 is 83 acres. LMU No. 4 is 98 acres. LMU No. 5 measures 80 acres in size. LMU No. 7 is 72 acres large. And LMU No. 8 is 45 acres. These six LMUs should be subdivided to meet the Texas NRCS Code 590 standard, with new soil sampling conducted on each of the smaller LMUs. This of course would require a revised LMU map and NMP to be prepared. However, failure to do so would leave the application inconsistent with Title 30, Section 321.42(i)(5)(A), which requires field application under an NMP that is in accordance with NRCS Code 590.

29. Anticipated Crop Yields

The applicant makes projections of crop yields that are dependent on soil types, water availability, and sufficient nitrogen. Even though these projected crop yields directly impact the NMPs, there is no data in the application that demonstrates the reasonableness of the forecasted crop yield. This information should be readily available to the applicant, however, as the PPP has for years required the operator to maintain records of the actual annual yield of each harvested crop. Adherence to the Texas NRCS Code 590⁴ standard requires that the NMP be based on realistic yield goals for the crops. The NMP certification course states that these realistic yield goals are to be determined as a function of the historical yields from the fields.

³ p. 590-2.

⁴ p. 590-7.

The actual annual yield of harvested crops from the applicant's fields should be submitted to demonstrate that the applicant is using reasonable crop yields. Without this information, it is difficult to see how the application is deemed to be consistent with Title 30, Section 321.42(i)(5)(A) of the Texas Administrative Code.

30. Identification of Soil Test Location and Timing

Texas NRCS Code 590⁵ requires that NMPs include the approximate locations where soil tests will be taken and the time of year sampling will be conducted. The applicant's proposed NMP, however, does not include any of this information. This deficiency raises further questions of how the application meets the requirements of Title 30, Section 321.42(i)(5)(A), which requires the implementation of an NMP that is developed in accordance with NRCS Code 590.

31. Calculation of Agronomic Rates

The methodology that the applicant employs to calculate agronomic rates in its NMP appears to be fundamentally flawed. The NMP submitted in the application does not account for the nutrients available to plants in the root zone to satisfy the crop requirement. Instead, the NMP would allow nutrient application regardless of the actual soil nutrient content until the soil reaches a concentration of 200 ppm P. Even at that point, the NMP would continue to allow additional nutrient application despite the presence of more than three times the necessary nutrient levels needed to support optimum growth. The applicant's NMP should be revised to allow application of only that quantity of nutrients that will benefit optimum crop production (*i.e.*, beneficial use).

32. Waste and Wastewater Application to Fields Exceeding 200 ppm P

The North Bosque River TMDL Implementation Plan dated December 2002⁶ states that formal enforcement action will result if CAFOs "apply waste or wastewater to a WAF that has been documented to have exceeded 200 parts per million phosphorus in Zone 1 of the soil horizon." Draft Permit Provision VII.A.8(c)(2) would appear to substantially undermine this standard by allowing an application to continue as long as an NUP has been prepared and approved by the TCEQ. The Draft Permit would allow soil phosphorus concentrations to continue rising to as high as 500 ppm without requiring the implementation of any phosphorous reduction component. Application of waste and wastewater to fields in excess of 200 ppm (and especially 500 ppm) should be prohibited in order to be consistent with the language of the TMDL. As a minimum precaution, an NUP with a phosphorous reduction component should be required for fields in excess of 200 ppm, subject to Draft Permit Provision VII.A.8(c)(5).

⁵ *Id.*

⁶ p.16.

As a practical matter, irrespective of the TMDL, it should be remembered that 200 ppm phosphorus is four to sixteen times the agronomic need—that is, the amount of phosphorus needed for optimum growth of the proposed crops. NUPs are designed to ensure that manure, litter, and wastewater are all beneficially used. The definition of “beneficial use” in the rules is the “application of manure, litter, or wastewater to land in a manner that does not exceed the agronomic need or rate for a cover crop.” Given this context, it is difficult from a scientific perspective to justify how the application of waste to soil that contains four times the agronomic need constitutes beneficial use of that material. The City would request that the TCEQ reconsider this matter, and ultimately require the applicant, at a minimum, to implement an NUP with a phosphorous reduction component for fields in excess of 200 ppm phosphorous.

33. Regulation and Monitoring of Third-Party Fields

Draft Permit Provision VII.A.8(e)(5)(i)(B) requires the incorporation of manure applied to cultivated fields within 48 hours after land application. For uncultivated fields, however, the Draft Permit provides no application restrictions. The Draft Permit should be revised to prohibit waste application onto uncultivated fields.

In addition, Draft Permit Provisions VII.A.8(e)(5)(i)(C-E) should be revised to include a statement that the application rate is not to exceed the requirements of NRCS Code 590. Although more restrictive in many instances, it is possible for third-party fields to meet the requirements of Draft Permit Provisions VII.A.8(e)(5)(i)(C-E) but fail to meet the requirements of NRCS Code 590. For example, NRCS Code 590 requires that the application rate not exceed the annual crop P requirement in fields with a P-Index rated of “Very High.” Draft Permit Provision VII.A.8(e)(5)(i)(C) allows the nitrogen crop requirement rate if the field is less than 50 ppm irrespective of the P-Index. Adherence to NRCS Code 590 should be required if it is more restrictive. The City would recommend that a specific provision be added to the Draft Permit that requires adherence to NRCS Code 590 for third-party fields when such a standard is more restrictive.

Furthermore, according to Draft Permit Provision VII.A.8(e)(5)(i)(A), no NMP is required for third-party fields. Without preparing an NMP, the requirements of Permit Provisions VII.A.8(e)(5)(i)(C-E) cannot be met since an NMP is the planning tool that is necessary to determine the appropriate application rates.

Because the applicant is not required to report the actual yields of each harvested crop in the PPP, the phosphorus crop removal rates are extremely difficult, if not impossible, to calculate with any measure of reliability. This of course makes compliance with the phosphorus application rate limitations extraordinarily difficult to ascertain. The City requests that Draft Permit Provision VII.A.8(e)(5)(iv) be revised to clarify the methods that the TCEQ will employ to determine compliance in the absence of any annual harvested yield reporting requirements.

34. Sludge Application to Third-Party Fields

Draft Permit Provision VII.A.8(e)(5) would allow sludge to be applied to third-party fields. Title 30, Section 321.42(j) of the Texas Administrative Code, however, allows only manure, litter, and wastewater to be applied to third-party fields. The City would request that the Draft Permit be revised to clarify that no sludge may be applied to third-party fields.

35. Demonstration of Sustainability for the Term of the Permit

The NMP provided in the Draft Permit addresses only the first year of the permit. It fails to address the subsequent years of the five-year permit term. A five-year NMP should be prepared that shows the impacts of all nutrient management issues over the entire permit term, which would be particularly insightful with respect to determining the sustainability of the operation. With a five-year NMP establishing an overall maximum sustainable application rate, an annual NMP could then be used to make discreet adjustments to the application schedule for individual fields based on annual soil sampling and crop production. While it is true that the NMP may change each year based on site-specific sampling results, an NMP for the term of the permit would demonstrate that, based on projected application rates, the applicant has enough land to sustain its operation for the five-year permit term.

36. Identification of Historical Waste Application Fields

Title 30, Section 321.42(k) of the Texas Administrative Code requires that soil samples be taken in historical waste application fields as well as active LMUs. Although Draft Permit Provision X.R. requires a map of the historical fields to be maintained in the PPP, the historical fields have not been identified in the application or in the permit. Since active LMUs are identified in the Draft Permit, it would seem appropriate to identify the location of the historical fields in the Draft Permit, as well. This simple revision would alleviate a great deal of confusion regarding the naming, numbering, and location of waste application fields that has historically plagued similar permits.

37. Definition of Vegetative Buffers

Draft Permit Provision X.D requires that the operator install and maintain "filter strips" and "vegetative buffer setbacks" according to NRCS standards. While the NRCS does have practice standards for "filter strips,"⁷ no similar practice standard exists for "vegetative buffers." Without a definition and standard for "vegetative buffer," the term has marginal utility from a compliance viewpoint. A single tree in the buffer area could very well be considered a "vegetative buffer" without additional guidance from the TCEQ. If the TCEQ considers "vegetative buffers" to mean either "filter strips" as defined by NRCS Practice Code 393 or

⁷ See NRCS Practice Standard Code 393.

"riparian forest buffers" as defined by NRCS Practice Code 393, then this definition should be placed in the Draft Permit to make it clear to the applicant.

38. Delineation of Vegetative Buffer and Filter Strip Boundaries

It is not clear how the applicant is expected to calculate the boundaries of the vegetative buffers and filter strips required under the terms of the Draft Permit. The TCEQ has previously indicated that the appropriate method is to measure the filter strip starting from the bank of the stream and measuring up to the edge of the buffer, not starting from the centerline of the stream. The City, too, believes that this is the appropriate method, but believes that the Draft Permit does not make clear whether this is the method that the applicant will be expected to follow. The City would suggest simply articulating this accepted measurement method in the Draft Permit as a means of resolving this ambiguity.

39. Non-Attainment of Bacterial Water Quality Standards

The Draft Permit should be amended to include additional provisions that address the control of pathogens from the land application and irrigation operations authorized therein, given the bacterial problems that exist in the North Bosque watershed.

40. Sampling From Correct RCS

Draft Permit Provision X.Q requires the wastewater sampling to be taken from RCS No. 2. The NMP prepared for this application, however, uses a wastewater sample from RCS No. 1. The NMP should be revised to require sampling from RCS No. 2.

41. Preparation of Volume Allocations for Each RCS

The Draft Permit combines the volume allocations for RCS No. 1 and RCS No. 2. Although there is currently insufficient information in the application to allocate the design rainfall event runoff to the separate RCSs, this can easily be done with a stage-capacity table while factoring the spillway elevation in RCS No. 1. The majority of the time, these two RCSs will function as distinct RCSs. Only when rainfall events exceed the maximum monthly average and the level in RCS No. 2 rises above the spillway elevation of RCS No. 1 will the two RCSs operate somewhat like a 2-cell RCS.

The design rainfall event runoff in the following allocation is approximated based on RCS No. 2 being able to contain 2.67 acre-feet of the design rainfall event runoff before the level rises above the spillway elevation in RCS No. 1. Once the level rises above the spillway elevation, the design rainfall event runoff volume is stored in both RCS No. 1 and RCS No. 2 proportionally to the respective surface areas. While this particular table is an approximation, these values are easily calculated by knowing the true elevation of the spillway in RCS No. 1 and

using a stage-capacity table for each RCS. The Draft Permit should be revised to provide a specific volume allocation for each RCS.

Volume Allocations for RCSs (Acre-feet)							
RCS #	Design Rainfall Event Runoff	Process Generated Wastewater	Minimum Treatment Volume	Sludge Accumulation	Water Balance	Required Capacity without Freeboard	Actual Capacity without Freeboard
1	11.97	0	13.81	11.45	0	37.23	32.44
2	9.33	4.14	0	0.11	8.77	22.35	15.69

42. Identification of LMU No. 5A

Soil sampling data on a soil analysis report dated October 26, 2007 indicates the existence of an LMU No. 5A with a soil P of 164 ppm. The location of this LMU is not identified on the LMU map and this LMU is not included in the NMP. The location of this LMU should be disclosed in the application and included in the NMP.

43. Reporting for Third-Party Fields.

The Draft Permit and Commission rules allow for the disposal of wastewater or manure by the use of third-party fields not owned, operated, controlled, rented or leased by the applicant. Both the Draft Permit and Commission rules limit the use of third-party fields to only those for which a soil test phosphorus analysis shows a level less than 200 ppm and require initial and annual soil sampling. In addition, the Draft Permit sets out land application rates for such fields. However, the Draft Permit does not include provisions that require the applicant to report information regarding land application rates and soil testing to the Commission to ensure compliance. The Draft Permit only requires that the applicant submit records to the regional office containing the "name, locations, and amounts of wastewater, sludge, and/or manure transferred to operators of third party fields."⁸ It is not apparent how compliance with the Draft Permit provisions regarding third-party fields can be determined without further information on soil testing, areas of application, application rates, etc. The inclusion of additional provisions regarding reporting for third-party fields to clarify that information needed to determine compliance will provide for better enforcement. For example, such provisions could include revision of VII.8.(e)(5)(iv) to state that

⁸ Draft Permit VII.8(e)(5)(iv).

[t]he permittee shall submit records to the appropriate regional office quarterly that contain the name, locations, and amounts of wastewater, and/or manure transferred to operators of third-party fields, 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 area, and crops and crop yields for the preceding quarter.

In addition, it would be beneficial if this information is also included in the annual report to the Office of Enforcement pursuant to 30 Tex. Admin. Code § 231.36(j), along with (i) copies of contracts with the applicable third-party field operators; (ii) a statement that application rates in any third-party field met permit requirements during the previous year; and (iii) a summary of discharges from third-party fields or a statement that there has been no discharge from any third-party field. If such information is included, the performance of the operator with respect to use of third-party fields for the previous year may be reviewed in a holistic manner with all necessary information available.

44. Control of Third-Party Fields

The Draft Permit prohibits discharges except as provided by the permit and federal regulations. The Draft Permit authorizes discharges from RCSs whenever "chronic or catastrophic rainfall events or catastrophic conditions cause an overflow."⁹ The Draft Permit also prohibits the "drainage of wastewater, sludge and manure from an LMU" unless authorized under certain conditions.¹⁰ However, the Draft Permit, although allowing the application of waste on third-party fields, is silent with respect to drainage or discharges from third-party fields. It is important that the Draft Permit clearly state that drainage or discharges of wastewater or manure from third-party fields is prohibited. Otherwise, there does not appear to be any control regarding the over-application of waste on third-party fields. Better control of third-party fields is very important because such fields do not benefit from the use of RCSs, NMPs, or other protections imposed on LMUs. In addition, the Commission should consider prohibiting the applicant's further use of any third-party field if it is determined that it has ever disposed of waste on a third-party field when the most current soil test reflects phosphorous concentrations of greater than 200 ppm or the application rate established by permit for a third-party field is ever exceeded. The use of third-party fields should be considered to be a privilege that should be revoked if it is ever abused.

The City of Waco hereby requests that the Executive Director consider these comments in evaluating the Draft Permit which has been proposed to Randy Earl Wyly/Wyly Dairy No. 1.

⁹ A "chronic or catastrophic rainfall event" is defined at 30 Tex. Admin. Code § 321.32(10) as a "series of rainfall events that do not provide opportunity for dewatering a retention control structure and that are equivalent to or greater than the design rainfall event or any single rainfall event that is equivalent to or greater than the design rainfall event."

¹⁰ Draft Permit VII.8(f)(2)(i).

Ms. LaDonna Castañuela

October 24, 2008

Page 18

The City appreciates the opportunity to submit these comments and the consideration it hopes the Executive Director and Commission staff will give to them.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Rochelle", written in a cursive style.

Martin C. Rochelle

MCR/ldp

2402\04\ltr081017ljk

cc: Applicant Randy Earl Wyly/Wyly Dairy No. 1
Mr. Larry Groth, City Manager, City of Waco
Ms. Leah Hayes, City Attorney, City of Waco
Mr. Wiley Stem, III, Assistant City Manager, City of Waco
Mr. Bruce Wiland