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July 28, 2009

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

VIA HAND DELIVERY

Re: In the Matter of the Application by Randy Earl Wyly
for Permit No. WQ0003160000
TCEQ Docket No. 2009-0709-AGR

Dear Ms. Castañuela:

Enclosed for filing please find the original and a copy of Requestor's Reply to Response to Hearing Request in the above-referenced matter. Please file stamp the copy and return it to me via my messenger.

If you have any questions, please do not hesitate to contact me at (512) 322-5810.

Sincerely,

Martin C. Rochelle

MCR/ldp
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ENCLOSURE

cc: Service List

TCEQ DOCKET NO. 2009-0709-AGR

2009 JUL 28 PM 4:06

APPLICATION BY
RANDY EARL WYLY FOR
PERMIT NO. WQ0003160000

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CHIEF CLERKS OFFICE

REQUESTOR'S REPLY TO RESPONSE TO HEARING REQUEST

TO THE HONORABLE COMMISSIONERS:

COMES NOW, the Bosque River Coalition, (the "Coalition" or "Requestor"), and files this Reply to Response to Hearing Request in the above-referenced matter, in reply to the response filed by the Executive Director (the "ED") of the Texas Commission on Environmental Quality ("TCEQ" or the "Commission"). Pursuant to Section 55.211(c) of Title 30 of the Texas Administrative Code ("TAC"), the Coalition's request for hearing should be granted by the Commission because (1) a member of the Coalition, Mr. Chuck Markham, qualifies as an "affected person" and therefore the Coalition is an "affected person"; (2) all issues raised by the Coalition are relevant and material disputed issues of fact raised during the comment period that are not based upon withdrawn comments; (3) the request was timely filed with the chief clerk; (4) the Coalition's request is made pursuant to a right to hearing authorized by law; and (5) the request complies with the provision of Section 55.201.

The ED's contention that a contested case hearing should not be granted to the Coalition because Mr. Markham is not an affected person is baseless because it relies solely on the presumption that a permit only allowing a discharge during certain rainfall events will, as a matter of law, not impact the downstream landowners. This presumption fails because this issue is a central question of fact raised by the Coalition's hearing request. Further, all the issues upon which the Coalition based its hearing request, even as reframed by the ED, are disputed issues of

fact relevant and material to the decision on the application. As such, the Coalition's hearing request, and all the issues specified therein, should be referred to the State Office of Administrative Hearings ("SOAH").

I. INTRODUCTION

Randy Earl Wyly/Wyly Dairy No. 1 (the "Wyly Dairy" or "Applicant") applied to the TCEQ on October 31, 2007 for a major amendment of Texas Pollutant Discharge Elimination System ("TPDES") Permit No. WQ0003160000 (the "Permit") for a Concentrated Animal Feeding Operation ("CAFO"). The major amendment will authorize the Applicant to expand an existing Dairy facility (the "Facility") from 1,500 head to a maximum capacity of 3,000 head, all of which would be milking cows.

On May 13, 2009, the Coalition filed a timely request for hearing regarding the Permit. The ED provided its Response to Hearing Request ("ED Response") on July 14, 2009 and recommended the Coalition's hearing request be denied. The Office of Public Interest Counsel ("OPIC") filed its Response to Request for Hearing ("OPIC Response") on July 14, 2009 and recommended therein that the hearing request be granted.

In accordance with Section 55.209(g), the Coalition as requestor files this Reply to Response to Hearing Request and requests that the Commission grant the hearing request for the reasons set forth below.

II. REPLY TO EXECUTIVE DIRECTOR'S RESPONSE

A. Public Involvement in Environmental Permitting

During the 76th Legislative Session, House Bill 801 ("HB 801") was enacted to modify the permitting process for certain environmental permit programs administered by the Commission for which public notice and opportunity for hearing were required. 24 *Tex. Reg.*

9039 (October 15, 1999). The purpose of HB 801 was to allow and encourage public involvement in the permitting process by requiring early public notice, substantive public comment, and agency response. *Id.* HB 801 enacted, in part, Subchapter M. Environmental Permitting Procedures, Sections 5.551-5.558 of the Texas Water Code (“TWC”). *Id.* In accordance with HB 801, the Commission promulgated rules under Chapter 55 of 30 TAC to further clarify public involvement in environmental permitting. *Id.*

B. Legislative Intent to Protect the North Bosque River Watershed

In 2001, the 77th Texas Legislature passed HB 2912, based upon its heightened concern associated with the impacts of dairies on the North Bosque River watershed. HB 2912 sought to protect the North Bosque River watershed from adverse environmental impacts associated with dairy activities by creating a major sole source impairment zone (“MSSIZ”) for this watershed. *See* TEX. WATER CODE §§ 26.501-504. The very purpose and effect of a MSSIZ is to reduce pollution in those areas and waterways that are particularly vulnerable to degradation from dairy activities. *Id.* Inherent in HB 2912 is the principle that if more stringent requirements for a dairy CAFO were implemented, improved water quality for the North Bosque River should result. 29 *Tex. Reg.* 6664 (July 9, 2004). Consistent with the concerns associated with such an impairment zone, a CAFO permit application for a facility located within the MSSIZ is subject to specific heightened protections. *See generally* TEX. WATER CODE §§ 26.501-504. One of the protections is the requirement for individual permitting. TEX. WATER CODE § 26.503(a). This requirement presents a substantial departure from practices in effect before the legislation was enacted.

Prior to HB 2912, it was acceptable for a CAFO within the North Bosque River watershed to secure authorization for its regulated activities through a general permit. After passage of HB 2912, TCEQ was no longer authorized to issue a general permit to any dairy

CAFO within a MSSIZ. TEX. WATER CODE § 26.503. By this legislation, the Legislature, in clear and precise language, required that all permits in the North Bosque River watershed be processed as individual permit applications. Inherent in that change is the concept that CAFO permits such as the Applicant's are subject to contested case hearing proceedings under Chapter 55 of 30 TAC. Obviously, the Legislature intended to allow "affected persons" to contest CAFO permit applications within a MSSIZ. Under the ED's interpretation of the applicable law, however, there is not a single person or entity that is entitled to standing in a contested case hearing on a CAFO permit, regardless of whether the permit is a general permit or an individual permit. The ED's position—that because the Permit does not authorize discharges, people located a few miles downstream cannot possibly be affected—is completely contrary to the legislative intent in enacting HB 2912. In fact, the ED's position completely undermines the Legislature's intent in passing both HB 801 and HB 2912 by not only effectively preventing affected persons from participating in a contested case hearing for a CAFO permit, but also by failing to adequately protect the North Bosque River watershed.

C. Bosque River Coalition

The Coalition has utilized and complied with the procedures under Chapter 55 of 30 TAC, and in the spirit of HB 801, to request a hearing to protect the Coalition's interests from the permitting of CAFOs like the Facility. The ED, on the other hand, seeks to effectively nullify this public involvement in contravention of HB 801 by denying the hearing request based upon broad, sweeping assumptions as to the effectiveness of the Permit and the Facility's expected compliance with the Permit—neither of which have any basis. Moreover, allegations that the Coalition's existence and actions in this matter represent an attempt to circumvent the rules are not only irrelevant, but offensive. The Coalition is a lawfully created Texas non-profit

organization, having filed organizational documents with the Texas Secretary of State. The Coalition is currently pursuing its purpose of protecting the North Bosque River watershed. The Coalition has identified three stream bank restoration projects within the North Bosque River watershed that members of the Coalition intend to commence within the next six months. The Coalition has also located two trash dump sites within the North Bosque River watershed for which members intend to organize and conduct a clean-up. Individuals have a lawful right to join the Coalition; the City of Waco has the right to join the Coalition; together, members of the Coalition have the lawful right to participate in the manner in which they have sought to participate here; every public interest group or association has members, whether they be individuals, businesses, industries, or even political subdivisions, who are individually affected to a degree greater than other members—associational standing, as formed by the Supreme Court of Texas, fully acknowledges this reality. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440 (Tex. 1993). These facts do not equate to circumvention of TCEQ rules, sham actions, or disingenuous pleadings, as the ED alleges. The evaluation of the Coalition's hearing request should be based on whether the Coalition complied with the specific requirements for hearing requests, as set forth in the applicable sections of TAC, and not on the ED's mere conjecture.

D. General Hearing Request Requirements

In compliance with Section 55.201, the Coalition filed a timely hearing request in writing that was based upon issues raised in public comments during the public comment period that were not later withdrawn. Furthermore, the Coalition provided (1) the relevant contact information required; (2) identified that person's personal justiciable interest affected by the application; (3) clearly requested a contested case hearing; and (4) listed all the relevant and

material disputed issues of fact that were raised during the public comment period that are the basis of the hearing request.

E. Requirement of Affected Person Status and Personal Justiciable Interest

Pursuant to Section 55.203(c), a number of factors are evaluated to determine whether a requestor qualifies as an “affected person.” The Coalition identified Mr. Chuck Markham, a member of the Coalition, as an affected person that “has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” In the Coalition's request for hearing, the Coalition set forth a personal justiciable interest by providing:

a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the public. 30 TAC § 55.201(d)(2).

The Coalition established that Mr. Markham is an affected person that has standing to request a contested case hearing. Mr. Markham owns property approximately 2.75 miles from the Facility along an unnamed tributary of Little Duffau Creek that is downstream from several Land Management Units (“LMUs”) of the Facility, being a tributary into which discharges and runoff from the Facility would drain during and following certain storm events. The Coalition indicated in its request that Mr. Markham runs livestock on his property that are watered from this tributary and that Mr. Markham and his family also use the tributary for picnicking and recreation. Because of the location of the Facility, Mr. Markham is concerned that any potential discharge from the Facility will negatively affect water quality in the tributary of Little Duffau Creek, thereby threatening the use and enjoyment of his property and the tributary in a manner not common to members of the public. This information meets the requirements of Section 55.201(d)(2). In addition, Mr. Markham is an affected person under Section 55.203 because he

has a legal right to the enjoyment of his private property and further has an economic interest in maintaining the water quality of the tributary as a water supply for his livestock. Clearly, a reasonable relationship exists between Mr. Markham's personal justiciable interest and how this interest would be infringed upon by upstream discharges or runoff from the Facility.

In its response, the ED attempts to argue that Mr. Markham does not qualify as an affected person for two primary reasons – (1) the distance of Mr. Markham's property from the Facility is too far; and (2) “no discharge” will occur from the Facility. Both of these reasons fail to support the ED's determination that Mr. Markham is not an affected person.

First, the ED indicates that Mr. Markham's property is a minimum of 3.9 miles from the Facility, whereas the Coalition indicates such distance to be 2.75 miles. Utilizing either distance, Mr. Markham still qualifies as an affected person. The tributary of Little Duffau Creek into which any discharges from the Facility will flow is upstream of Mr. Markham's property. This tributary then flows into Little Duffau Creek, and thence into the North Bosque River, a segment that is already impaired and subject to a total maximum daily load (“TMDL”) for the very pollutant that is principally regulated by the Permit. In light of such impairment for pollutants that are regulated by the Permit and that may be discharged from the Facility, the 1.15-mile difference between the Coalition and the ED's calculations is not meaningful. Mr. Markham's use of his property could be impacted by a discharge from the Facility due to increased pollutant loadings to the watershed. Furthermore, although regulations note that a person's distance to a regulated activity is a factor in determining status as an affected person, no exact distance restriction exists. *See* 30 TAC § 55.203(c); *see also* OPIC Response, page 5. Although it may be TCEQ's policy to take a closer look at a hearing request when the alleged person affected is beyond one mile downstream, a broader approach should be taken in this instance given the

North Bosque River's impaired status for the very pollutants that are regulated by the Permit and that may be discharged from the Facility.

This broader approach is appropriate for a couple of reasons. First, if a discharge from the Facility were to occur from storm events meeting or exceeding the 25-year, 10-day storm event, tremendous loadings of pollutants would discharge downstream, thereby impacting Mr. Markham's property. Second, this broader approach is particularly appropriate given the Permit's lack of a requirement that the Applicant identify third-party fields receiving and applying wastewater, sludge and manure from the Facility. These fields are not identified in either the application or the Permit but yet are authorized to be used for waste disposal, so fields could be located less than a mile upstream of Mr. Markham's property. Without knowing where these third-party fields are, the Commission should err on the side of caution and grant Mr. Markham affected person status given the additional impact discharges or runoff from third-party fields could have.

Surprisingly, the ED also argues that Mr. Markham is not an affected person because there will be no impact to his property as “no discharge” is authorized under the Permit for the Facility. This broad assumption, if taken at face value, would never confer affected person status on a requestor on the basis of impacts due to possible discharge, no matter if they were 3.9 miles—or 3.9 feet—from a regulated facility. The ED indicates that Mr. Markham is not an affected person because he “does not have a personal justiciable interest distinguishable from that of the general public that would be affected by this application *since the permit does not authorize discharge into water in the state under normal operating conditions.*” ED Response, page 6 (emphasis added). This statement is akin to saying that a requestor would not constitute an affected person for a contested case hearing on a TPDES permit application because the

TPDES permit does not allow the exceedance of its effluent limits. The existence of the Permit makes *no guarantee* that no discharge will occur simply because the Permit prevents such discharge—and yet the ED asserts precisely this in its response. The ED's assertion raises the question—why is a notice authorizing the opportunity to request a hearing ever issued on any CAFO-related or TLAP-related disposal permit if persons filing hearing requests seemingly cannot be “affected” because there will be no authorized discharges from regulated facilities?

The simple existence of the requirement that the Applicant acquire the Permit for the Facility establishes that a discharge may occur. Under Section 402 of the Clean Water Act (“CWA”), a permit is mandated for any discharge of pollutants to navigable waters from any “point source”—a “point source” being defined to include a concentrated animal feeding operation. *See* 33 U.S.C. §§ 1342(a)(1) and 1362; *see also* TEX. WATER CODE § 26.001(21) (defining “point source” as including a concentrated animal feeding operation). EPA delegated TCEQ the authority to administer the TPDES Program in accordance with the CWA. TWC Section 26.027 authorizes TCEQ to issue permits for the discharge of waste or pollutants into water in the state. TEX. WATER CODE § 26.027. The regulations specific to issuance of permits for CAFOs are contained in Chapter 321 of TAC. Under Section 321.33 of TCEQ’s CAFO rules, “[a] discharge from” certain CAFOs, like the Applicant's, “may be authorized only under an individual water quality permit in accordance with Section 321.34 of this title (relating to Permit Applications).” 30 TEX. ADMIN. CODE § 321.33. 30 TEX. ADMIN. CODE § 321.33. Thus, the mere existence of the Permit and its issuance to the Applicant substantiates that a discharge is authorized.

The ED attempts to support this argument by suggesting that even under conditions when the Facility would be allowed to discharge, in the event of a 25-year, 10-day storm event, such a

discharge “may not occur” because this amount of rainfall is “very infrequent” in the area of the Facility, and because retention control structures (“RCSs”) are created to contain such rainfall events. ED Response page 6. This argument is flawed for several reasons. First, the notion that the Applicant's RCSs are designed, constructed, operated, and maintained so as to contain a discharge from all rainfall events, up to and including the 25-year, 10-day storm event, is a critical disputed *issue of fact*. Second, when storms exceeding the 25-year, 10-day event do occur, tremendous loadings of phosphorus will be discharged from the Facility, harming downstream properties, including Mr. Markham's property. This, too, is an *issue of fact*.

The ED improperly considered the factors for determining an affected person under Section 55.203—basing its decision on the property's distance from the Facility and providing no facts, or even analysis, that at this distance Mr. Markham's property and use of property would not be impacted. The ED instead simply argues that there will be no impact to Mr. Markham because his property is too far, and because the Permit does not authorize a discharge—as if words alone prevent such discharges from happening. Such words are particularly ironic given that the impaired status of the North Bosque River watershed is due, in large part, to discharges from CAFOs like the Facility—a fact noted by TCEQ in the *Implementation Plan for Soluble Reactive Phosphorus in the North Bosque River Watershed*. See TCEQ, *Implementation Plan for Soluble Reactive Phosphorus in the North Bosque River Watershed*, December 2002. Had the ED properly considered these factors for determining affected person status, it would have determined that Mr. Markham qualifies as an affected person, and for the reasons the Coalition set out in its hearing request. See OPIC Response, pages 4-5.

The Coalition's request also complied with the additional requirements for when a hearing request is made by a group or an association. 30 TAC § 55.205(a). First, one or more

members of the group must have standing to request a hearing in his or her own right. 30 TAC § 55.205(a)(1). As discussed above, Mr. Markham qualifies as an affected person and therefore has standing in his own right. Second, the interest the group seeks to protect is an interest germane to the organization's purpose. 30 TAC § 55.205(a)(2). As indicated in the hearing request, the Coalition seeks to protect the water quality of the Bosque River—clearly an interest germane to the Coalition's purpose of furthering the protection and enhancement of water quality in the watershed. Finally, the Coalition established that neither the claim asserted nor the relief requested requires the participation of the Coalition's individual members. 30 TAC § 55.205(a)(3). Therefore, as an association, the Coalition has status as an “affected person.”

F. Disputed Issues Raised in the Request for Hearing

In order to make a request for hearing, all relevant and material disputed issues of fact raised during the public comment period upon which the requestor bases the request for hearing must be provided. 30 TAC § 55.201(d)(4). In accordance with Sections 55.201(d)(4) and 50.115(c) of 30 TAC, the Coalition based its hearing request on the following issues that (1) are 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).
29. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields (Comment No. 41).

In its response, the ED complains that the disputed issues of fact asserted by the Coalition are “overbroad to the extent that they bring in issues not raised during the comment period.” ED Response page 7. The issues set forth by the Coalition are exactly what the Coalition portends—disputed issues of fact that arose during the comment period. There is no requirement under TCEQ rules that the disputed issues of fact be *verbatim* the comments raised during the comment period. In its framing of the issues, the Coalition sought to consolidate numerous comments that were timely made and which form the basis of the Coalition's hearing requests. The issues raised by the Coalition in its hearing request represent the essence of the comments made during the comment period, and they reference the applicable comment upon which each issue is based. The ED's categorization of these issues as “overbroad” appears to be more of an attempt by the ED to avoid addressing these disputed issues of fact directly so that it can merely regurgitate the precise responses the ED made to the comments. Consequently, the ED Response *fails* to comply with the content requirements for a response to a hearing request under Section 55.209(e) because it does not address the specific issues raised in the Coalition's hearing request.

Even if the allegations of the ED were correct, the ED's argument for referring only issues #1-5 out of 45 is completely unfounded and legally incorrect. The ED asserts that issues #6-45, as the Coalition's 29 issues were reformed by the ED, are either (1) not relevant and material to a decision on the application or (2) concern a matter of law, not a disputed issue of fact.

i. Relevant and Material Issues

Each of the issues set forth in the Coalition's hearing request is clearly relevant and material to the decision on the application by addressing whether specific requirements and conditions of the Permit will adequately protect the Bosque River watershed from illegal

discharges or runoff from the Facility. As noted in the OPIC Response, “[r]elevant and material issues are those that are governed by the substantive law under which this Permit is to be issued.” OPIC Response, page 8 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986)). The issues cited by the Coalition, and even the issues as improperly reframed by the ED, all constitute relevant and material issues because they are governed by the law established to protect the water quality of the North Bosque River watershed—Chapter 26 of the TWC, Chapter 307 of 30 TAC, and Subchapter B, Chapter 321 of 30 TAC.

For example, in the ED's Response, reframed issue #7 is “[w]hether the Applicant should be required to produce an RCS Management Plan prior to the permit being issued.” ED Response page 8. The ED responds to its reframed issue by indicating that “TCEQ rules do not require review of RCS management plans prior to issuing the permit....Therefore, the fact that the Applicant has not produced an RCS management plan prior to permit issuance is not relevant and material to a decision on the application.” *Id.* at 9. The ED's response to reframed issue #7 does not make sense. RCSs represent the very infrastructure that the ED alleges in its Response will contain any possible discharge during a 25-year, 10-day storm event, and yet the ED does not believe that this issue is relevant and material? The issue essentially addresses whether the draft permit is adequately protective of water quality standards without TCEQ review of the RCS management plan. There is no way to determine that such an issue is not relevant and material to a decision on the application—particularly given the ED's position as to the use of RCSs to control discharges during 25-year, 10-day storm events.

As a second example, the ED's reframed issue #25 is “[w]hether the draft permit properly accounts for the management of phosphorus production in compliance with the CAFO rules.” ED Response page 12. In response, the ED states that “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...Therefore, this issue is not relevant and material to a decision on the application.” *Id.* at 13. The Permit authorizes the Applicant to operate with 3,000 cows that will produce 426,320 pounds per year (“lbs/yr”) of phosphorus, of which only 191,065 lbs/yr will be applied to LMUs or to unidentified third-party fields. This leaves a remainder of 235,255 lbs/yr of phosphorus that is unaccounted for at the Facility. The Facility is located in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River basin. Segment No. 1226 currently has a TMDL for phosphorus that seeks to reduce levels of phosphorus in the stream segment. *See TCEQ, Two Total Maximum Daily Loads for Phosphorus in the North Bosque River for Segments 1226 and 1255*, February 2001. This TMDL even identifies CAFOs as point source dischargers—and in the case of the Facility, it is a point source discharger of up to 235,255 lbs/yr of phosphorus. An issue is relevant and material to a decision on the Permit if it is governed by the substantive law under which the Permit is to be issued. TMDLs are required under Section 303(d) of the Clean Water Act and TCEQ is required to consider and comply with Section 303(d) in making its decision on the Permit—thereby establishing both the relevancy and materiality of the issue.

ii. Disputed Issues of Fact

A number of the ED's arguments indicate that the issues raised by the Coalition in its hearing request, but reformed by the ED in its response, are a “matter of law” and should not be referred to SOAH because no legal requirement exists regarding the specific disputed issue. Not surprisingly, in the ED's focus on the details, the ED failed to acknowledge the legal requirement at the heart of each of the Coalition's proposed disputed issues of fact—the requirement that

“[e]ach permit shall contain terms and conditions...necessary to protect human health and safety, and the environment.” 30 TAC § 321.36(b).

The mere fact that an issue raised is over a concern with the Facility not specifically addressed in TCEQ’s regulations does not automatically transform a disputed issue of fact into a “matter of law.” Texas courts have addressed the difference between that which constitutes a disputed issue of fact and that which constitutes a matter of law. *See Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994); *see also Coldwell Bank Whiteside Assocs. v. Ryan Equity Partners, Ltd.*, 181 S.W.3d 879 (Tex. App.—Dallas 2006, no pet.). An issue of fact will only be established as a matter of law if the issue is undisputed and reasonable minds could not differ as to the conclusion of the issue. *Lehman v. Wieghat*, 917 S.W.2d 379, 382 (Tex. App.—Houston[14 Dist.] 1996, writ denied) (citing *Southwest Wheel & Mfg. Co. v. Sholts*, 501 S.W.2d 387 (Tex. App.—Beaumont 1973, writ ref’d n.r.e.)). The ED’s response to, or more appropriately dispute of, the public comments made by the City of Waco and the Coalition’s hearing request evidence that these issues are in dispute, and further, that reasonable minds—the ED’s versus the Coalition’s—can differ. OPIC’s recommendation to refer all the issues in the Coalition’s hearing request is further support that these issues constitute disputed issues of fact upon which reasonable minds differ.

As an example, the ED’s reframed issue #8 is “[w]hether the permit application uses an acceptable value for open lot runoff for calculating sludge accumulation volume.” ED Response page 9. The ED simply responds that “[a]s a matter of law, the method used by the Applicant is considered acceptable for use in Texas, as it is one of a limited number of methodologies.” *Id.* The Applicant 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. The Coalition disputes, given the lack of any support, whether this value is acceptable, whereas the ED claims that the Applicant used an acceptable method to determine this value. The reframed issue #8 is a textbook example of a disputed issue of fact. Just because the method utilized by the Applicant may, arguably, constitute an acceptable method in Texas does not automatically make this value acceptable in a way to adequately protect water quality in the Bosque River watershed. The fact issue of whether the value for open lot runoff for calculating sludge accumulation volume is acceptable in this instance is disputed by both the Coalition and the ED; therefore, this issue should be referred to SOAH.

Another example is in the ED's reframed issue #39, which is “[w]hether the draft permit meets the applicable regulatory requirements in regards to addressing water quality concerns potentially caused by bacteria and other pathogens.” ED Response page 16. The ED indicates that best management practices (“BMPs”) may be used for controlling bacteria and that “[a]s a matter of law, there are no further requirements to impose additional BMPs not already in place or that would be required if the draft permit is issued, to specifically address bacteria separately from nutrients.” *Id.* This response does not even directly address the issue raised in the Coalition’s hearing request as to whether water quality in the Bosque River watershed will be protected by the Permit. The ED merely argues that BMPs may be used to limit the amount of bacteria—not that BMPs used by the Facility will limit the amount of bacteria and protect water quality, just that the Facility has a mechanism for doing so. The Coalition disputes whether water quality will be adequately protected from bacteria and other pathogens under the Permit pursuant to TCEQ regulations. The ED disputes this issue by not examining whether BMPs used by the Applicant will actually protect water quality from bacteria and other pathogens—

presuming that the simple existence of current BMPs, and not actual application of same, will protect water quality. As such, this issue constitutes a disputed issue of fact regarding adequate protection of water quality. The lack of a specific regulation for additional BMPs does not convert this issue into a matter of law.

An analogy may be helpful to better explain the flawed nature of the ED's argument. A hearing requestor concerned about a toxic metal's effects of the discharge by a publicly owned treatment works ("POTW") to receiving waters could ask the Commission to consider the imposition of a specific limit for the metal even though the Water Quality Standards and the Commission's implementation procedures would not normally require the application of such a limit based on the given circumstances of the discharge. Does the hearing requestor's request for a limit that may not be specifically required under the TCEQ rules and policies negate the requestor's underlying comment and interest in protecting water quality so as to render the underlying issue as not referable as a matter of law? Clearly, in this example, the requestor is raising an issue that is within the scope of the Commission's jurisdiction to consider. That the requestor's proposed solution, the imposition of a specific limit, may not be specifically required under the rules and policies of the agency at this time is an argument to be made by the Executive Director during the hearing, not a reason to deny the hearing request.

Whether specifically set forth in TCEQ regulations or not, the issues set forth by the Coalition are disputed issues of fact that are relevant and material to the determination of the Facility's application. Therefore, all of the foregoing issues as set forth by the Coalition are appropriate for referral to hearing.

III. CONCLUSION

For the reasons set forth above, the Bosque River Coalition respectfully requests that the Commission grant the Coalition's contested case hearing request and refer this matter to SOAH for a contested case hearing.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of July, 2009, a true and correct copy of the foregoing was sent via first-class mail, electronic mail, facsimile, or hand-delivery to the following persons:

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