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

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 13, 2009

TO: Persons on the attached mailing list.

RE: Randy Earl Wyly
TPDES Permit No. WQ0003160000

Decision of the Executive Director.

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

Enclosed with this letter is a copy of the Executive Director's Response to Comments. A copy of the complete application, draft permit and related documents, including public comments, is available for review at the TCEQ Central office. A copy of the complete application, the draft permit, and executive director's preliminary decision are available for viewing and copying at the TCEQ Region 4, Stephenville Office, 580 D West Lingleville Road, Stephenville, Texas 76401.

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

How To Request a Contested Case Hearing.

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

The request must include the following:

(1) Your name, address, daytime telephone number, and, if possible, a fax number.

(2) If the request is made by a group or association, the request must identify:
   (A) one person by name, address, daytime telephone number, and, if possible, the fax number, of the person who will be responsible for receiving all communications and documents for the group; and
   (B) one or more members of the group that would otherwise have standing to request a hearing in their own right. The interests the group seeks to protect must relate to the organization's purpose. Neither the claim asserted nor the relief requested must require the participation of the individual members in the case.

(3) The name of the applicant, the permit number and other numbers listed above so that your request may be processed properly.

(4) A statement clearly expressing that you are requesting a contested case hearing. For example, the following statement would be sufficient: "I request a contested case hearing."

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

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

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

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

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

Deadline for Submitting Requests.

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

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

Processing of Requests.

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

How to Obtain Additional Information.

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

Sincerely,

LaDonna Castañuela
Chief Clerk

LDC/er

Enclosures

MAILING LIST
for
Randy Earl Wyly
TPDES Permit No. WQ0003160000

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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CHIEF CLERKS OFFICE

Proposed Amended TPDES Permit No. WQ0003160000

Application by	§	Before the
Randy Earl Wyly/Wyly Dairy #1	§	**TEXAS COMMISSION ON**
for **TPDES Permit No. WQ0003160000**	§	**ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO PUBLIC COMMENT

The Executive Director (ED) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Public Comment (Response) on the application by Randy Earl Wyly/Wyly Dairy #1 (Applicant) for a major amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0003160000 and on the ED's preliminary decision on the application. As required by Title 30 of the Texas Administrative Code (30 TAC) Section (§) 55.156, before a permit is issued, the ED prepares a response to all timely, relevant and material, or significant, comments. The Office of Chief Clerk timely received comment letters from the City of Waco (The City). This Response addresses all comments received, whether or not withdrawn. If you need more information about this permit application or the wastewater permitting process, please call the TCEQ Office of Public Assistance at 1-800-687-4040. General information about the TCEQ can be found at our website at www.tceq.state.tx.us.

BACKGROUND

Description of Facility

The Applicant has applied to the TCEQ for a major amendment to TPDES that would authorize the permittee to expand an existing dairy facility from 1500 head to a maximum of 3000 head, of which, 3000 head are milking cows. The facility is located on the west side of County Road 209, approximately one and a half miles south of the intersection of County Road 209 and U.S. Highway 67. This intersection is approximately seven miles southeast of Stephenville, in Erath County, Texas. The facility is located in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River basin.

Procedural Background

The application was received on October 31, 2007, and declared administratively complete on January 15, 2008. Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published January 21, 2008 in the *Stephenville Empire Tribune*. The alternative language NORI was published January 28, 2008 in the *Tex-Mex Noticias*. The TCEQ ED completed the technical review of the application and prepared a draft permit. Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published September 19, 2008 in the

Stephenville Empire Tribune. The alternative language NAPD was published September 24, 2008 in the *Tex-Mex Noticias,* and the comment period closed October 24, 2008. This application was administratively complete after September 1, 1999; therefore, this application is subject to the procedural requirements adopted pursuant to House Bill 801 (76th Legislature, 1999).

COMMENTS and RESPONSES

COMMENT 1

The City comments that the Applicant has underestimated the volume of runoff from the design rainfall event by not using the correct amount of surface area for the modified RCSs and not taking into account impervious cover in its calculations for the design rainfall event. The City believes that the applicant should submit a stage-volume-surface area table for the proposed RCSs.

RESPONSE 1

The acreages used in the design calculations were certified by a licensed Texas professional engineer based on an onsite evaluation at the facility. The surface area used in the RCS design and water balance inflow for the RCSs was calculated from the top of the berm of the existing structures, plus the expected surface area of the proposed expansion. The expected evaporation surface area used in the water balance was taken as a percentage of the total top of the berm surface area. The ED evaluated an aerial photograph to approximate the acreages. Based on the similarity between the approximate acreages and the acreages used in the application, the ED accepted the acres certified by the professional engineer.

A stage storage table is not a requirement because the TCEQ is evaluating proposed construction. Once construction is complete an actual stage storage curve will be part of the RCS management plan. The RCS management plan must establish expected end of the month water storage volumes for each RCS. These maximum levels are based on the design assumptions used to determine the required size of the RCSs. This plan assures that the Applicant will maintain wastewater volumes within the design capacity of the structures. The Applicant must document and provide an explanation for all occasions when the water level exceeds the expected end of the month storage volumes. By maintaining the wastewater level at or below the expected monthly volume, the RCS will be less likely to encroach into the volume reserved for the design rainfall event and/or discharge during smaller rainfall events.

The constructed RCSs will need to meet the minimum volume requirements and be certified as such. Until the actual expansion of the RCS system is completed and the volumes certified, the RCS management plan cannot be completed and implemented; and that expansion cannot take place until after the permit is issued.

COMMENT 2

The City comments that the draft permit does not require a stage/storage table to calculate the effect of evaporation on the monthly water balance. The City believes that the draft permit should be revised as follows: "a stage/storage table for each retention control structure (RCS) with minimum depth increments of one foot, including the storage volume and surface area provided at each depth."

RESPONSE 2

The surface area of a RCS is a factor used in designing the required capacity; the expected evaporation surface area used in the water balance was taken as a percentage of the total top of the berm surface area. Surface area will also be a factor in calculating the volume at each depth increment in the stage/storage table for the RCS management plan. For operational purposes, it is the volume measurement at each depth increment that needs to be known, not the surface area.

COMMENT 3

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

RESPONSE 3

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

The purpose of the RCS management plan is to assist the operator with proper management of the RCS system and to provide information for the TCEQ regional inspectors to determine if the system is being operated in compliance with the permit and the design of the RCS. Submittal of the RCS management plan is not necessary to achieve these purposes.

The draft permit does require an RCS management plan for all RCSs authorized in the draft permit. The Applicant has 180 days from the date the permit is issued to make RCS modifications. Until RCS modification is complete, the dairy may not exceed the 1,500 head currently authorized.

COMMENT 4

The City comments that the Applicant calculated the sludge accumulation volume from open lot runoff based on 25% of the runoff from the 25-year, 10-day rainfall event and that there is no technical or historical data to justify this value.

RESPONSE 4

Sludge accumulation volume requirements for sludge accumulation from runoff have been estimated as 25% of the 25-year, 24-hour runoff volume from open lot areas. The draft permit uses the calculated 10-year sludge volume as a 5-year design volume. It also uses the 25-year, 10-day storm event, which further increases the design volume of the RCS. The method used by the Applicant is one of a limited number of methodologies and is considered acceptable for use in Texas.

COMMENT 5

The City comments that settling basins and slurry ponds meet the definition of RCSs. The City notes that Section VII.A.3(a) of the draft permit appears to be inconsistent with TCEQ rules concerning capacity certifications for settling basins and slurry storage ponds. The City comments that design specifications and completed construction specifications certified by a licensed Texas professional engineer have not been provided for the settling basins and slurry storage pond to verify that it is properly sized to contain runoff during a 25-year, 10-day rainfall event. The City encourages the TCEQ to revise the draft permit to require capacity certifications for the settling basins and the slurry storage pond.

RESPONSE 5

Settling basins are an optional treatment practice to reduce sludge accumulation in the RCS designed to store wastewater. However, neither settling basins nor slurry ponds are used to store wastewater, thus their capacity may not be used to meet the minimum required volume on page 1 of the draft permit. Therefore, the capacity of the settling basins and slurry ponds are not relevant for purposes of sizing the RCS so that it meets the 25-year, 10-day design volume.

Slurry ponds are not designed or operated to contain runoff during a 25-year, 10-day rainfall event. That is the function of the RCSs. The RCSs are adequately sized to account for all precipitation within the drainage area, including that which falls on the slurry storage pond. The purpose of the slurry pond is to provide a location to store slurry from the freestall barns during periods when land application immediately upon removal is not possible, such as when fields are saturated.

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

COMMENT 6

The City comments that Concrete Basin No. 2 should be labeled on the Site Map as Concrete Settling Basin No. 2 to circumvent possible confusion as to whether it is subject to settling basin requirements.

RESPONSE 6

As 30 TAC § 321 rules do not require specific nomenclature for control facility structures, the ED declines to require this change. "Concrete Basin #2" is descriptive and differentiates the structure from other structures within the production area. As the Applicant has included a settling efficiency in the design plans, and the Runoff Control Map depicts the function of Concrete Basin #2 as a settling basin for the open lot and parlor, it will be subject to settling basin requirements of the permit.

COMMENT 7

The City comments that Settling Basin No. 1 is not referenced on the flow chart that was submitted with the supplement to the application and that the chart and sludge calculations, if need be, should be revised.

RESPONSE 7

The Runoff Control Map depicts that Concrete Settling Basin #1 receives only a portion of the runoff from the roof of Freestall #4 and the Adjacent Areas (areas in between Pens/Barns and RCSs). The engineering calculations do not account for a settling efficiency for Settling Basin No. 1. The ED verified the engineering and has found it acceptable.

On Figure 2.1, the flow chart, it would not be appropriate to incorporate Settling Bain No.1 as there is only a small portion of the adjacent area that flows through it. Therefore no changes to the flow chart were made in response to this comment.

COMMENT 8

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

RESPONSE 8

The ED declines to make this change. Settling basins are used to reduce the sludge accumulation in RCSs. The RCS is designed for five years of sludge accumulation. If the settling basins do not

achieve the removal efficiencies proposed in the design calculations, sludge will accumulate in the RCS at a faster rate than expected. The permit addresses this issue by requiring sludge accumulation to be monitored as needed, but at least annually beginning in year three of the permit. Taking volume measurements starting in year three will help reevaluate the accumulation rates prior to reaching the five-year design volume. The permit also requires the Applicant to maintain the sludge volume at or below the designed sludge volume.

COMMENT 9

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

RESPONSE 9

The ED declines to make this change. Settling basin solids are not "sludge" since there is no sludge volume allocation. Therefore, settling basin solids are defined as "manure." If settling basin solids are land applied, an annual sample must be collected and analyzed in accordance with Section VII.A.9(a) of the permit, in addition to other manure and wastewater.

COMMENT 10

The City comments that the draft permit should be amended to require annual determination of sludge accumulation instead of three years following permit issuance.

RESPONSE 10

30 TAC § 321.39(c) and Section VII.A.4(a)(7) of the draft permit prohibits the Applicant from allowing sludge accumulation to exceed the design volume. This is achieved by removing the sludge according to the design schedule. The design criterion for this dairy is five years of accumulation. The RCS management plan will establish accumulation rates in the RCSs, which will identify the current sludge volume in each RCS. Taking volume measurements starting in year three will help reevaluate the accumulation rates prior to reaching the five-year design volume.

By starting measurements in year three, the Applicant will have time to complete modification and expansion of RCSs, and to develop and implement an RCS management plan to appropriately manage the sludge volume in the ponds. Furthermore, taking daily pond marker readings should assist in determining excessive sludge accumulation in the RCSs.

COMMENT 11

The City comments that the draft permit fails to adequately define capacity certification requirements. The City states that Section VII.A.3(a)(2) should make it clear that all capacity certifications require certification of both total as-built capacity and the remaining capacity as a result

of sludge accumulation by inserting the following sentence: "Capacity certifications shall include both the total as-built RCS capacity and the remaining RCS capacity due to sludge accumulation."

RESPONSE 11

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

COMMENT 12

The City comments that a list of specific circumstances that would qualify for an extension to the deadline for completing RCS modifications should be included in the draft permit in Section X.A.2.

RESPONSE 12

The conditions that may delay construction of an RCS are numerous and highly variable. The extension request must provide an explanation of the conditions that prevented construction during the specified timeframe. The ED will evaluate the specific reasons on a case-by-case basis to determine whether to grant an extension.

COMMENT 13

The City comments that to properly certify the liners of the RCSs the Applicant needs to demonstrate that the RCSs are sufficiently lined to prevent leakage. To accomplish this, the City comments that the Applicant should take more samples to meet the number required by the TCEQ and take them on both the embankments and the bottom of the RCSs.

RESPONSE 13

The requirement in the draft permit exceeds the requirement of the existing permit and of the rules. Section VII.A.3.(g)(3)(ii) of the draft permit requires the following:

> For each RCS, a minimum of one undisturbed sample shall be collected per plan surface acre at the spillway elevation. For the purpose of determining the number of samples to collect, surface acres shall be rounded up to the next whole acre. Distribution of the samples shall be representative of liner characteristics, and proportional to the surface area of the sidewalls and floor. Documentation shall be provided identifying the sample locations with respect to the RCS liner."

This requirement is considered to provide certifications that will adequately document the permeability of the RCS liners. Therefore, the ED declines to make the change.

COMMENT 14

The City comments that the Applicant's settling basins and the slurry storage basins have not been certified by a professional engineer, as structurally sound, free of cracks and leaks and "having no hydrologic connection to waters of the state."

RESPONSE 14

In response to the comment, a special provision was added to the permit in Section X.S. The provision states:

> Within 180 days of issuance of this permit, the permittee shall ensure site-specific documentation is prepared and certified by a licensed Texas professional engineer that shows the concrete settling basins are free from integrity compromises such as cracking, leaking, or deterioration. This documentation shall be placed in the PPP and made available to the executive director upon request.
>
> During the annual site inspection, the permittee shall inspect the integrity of the concrete settling basin. Integrity compromises, such as cracking, leaking, or deterioration shall be repaired within 30 days of the inspection. Inspection and maintenance records for the concrete settling basin shall be maintained in the onsite PPP.

30 TAC § 321.38(g)(3) states: "The operator shall ensure site-specific documentation is prepared that shows that no significant hydrologic connection exists between the contained wastewater and water in the state." A slurry storage basin does not contain wastewater; therefore, no liner certification for slurry storage is required.

COMMENT 15

The City comments that the draft permit contains some procedures and requirements for liner and embankment testing, but it does not adequately address the testing of embankment construction in Section VII.A.3(f)(4). The City comments that TCEQ should: 1) require the field density tests to be based on predetermined moisture-density compaction curves, 2) define the frequency of testing (e.g., number of tests per specific area per lift), 3) require compaction testing on each lift during the construction of the liner (not merely on the last lift after completion of the liner), 4) require documentation and reporting of compaction test locations and results, 5) require continuous on-site inspection during construction. The City further comments that TCEQ should review compaction testing results to make an independent verification of the certification.

RESPONSE 15

Section VII.A.3(b) of the draft permit requires that the RCS be designed and constructed in accordance with the technical standards developed by NRCS, ASABE, ASCE, or ASTM. Additionally, the permit identifies specific RCS design, construction, and testing criteria in Section VII.A.3(f) and (g). The construction and testing requirements for embankment lifts are in Section VII.A.3(f)(2) and are as follows:

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

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

> Compaction Testing. Embankment construction must be accompanied by certified compaction tests including in place density and moisture in accordance with ASTM D 1556, D 2167 or D 2937 for density and D 2216, D 4643, D 4944 or D 4959 for moisture, or D 6938 for moisture and density. Compaction tests will provide support for the liner certification performed by a licensed Texas professional engineer as meeting a permeability no greater than 1×10^{-7} centimeters per second (cm/sec) over a thickness of 18 inches or its equivalency in other materials.

More specific liner requirements included in Section VII.A.3(g) of the permit include that a liner must be designed by a licensed Texas professional engineer and documented to have hydraulic conductivities no greater than 1×10^{-7}cm/sec in accordance with ASTM D 5084, or other method approved by the ED, with a thickness of 18 inches or greater or its equivalency in other materials, and not to exceed a specific discharge through the liner of 7×10^{-7} cm/sec with a water level at spillway depth.

The ED believes these testing requirements are adequate and protective of water quality.

COMMENT 16

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

RESPONSE 16

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

The permit only authorizes discharges from a properly designed, constructed, operated, and

maintained RCS in the event of chronic or catastrophic rainfall events or catastrophic conditions that cause an overflow. Discharges are not authorized under any circumstances from diversion structures.

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

COMMENT 17

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

RESPONSE 17

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

COMMENT 18

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

RESPONSE 18

The rules cited by the City do not require these records be submitted to TCEQ. However, 30 TAC § 321.46(d) requires that these records be maintained on site for a minimum of five years from the date the record was created and submitted to the Commission within five days upon written request by the ED. These records should be maintained in the PPP where they are subject to review during site inspections conducted by TCEQ field staff. Failure to conduct an annual site inspection or the five year evaluation; and to document the findings of both in the PPP or failure to correct the deficiencies identified would be a violation of the permit and rules subjecting the Applicant to potential enforcement action by the Commission.

COMMENT 19

The City comments that the draft permit fails to require the five-year evaluation to certify the adequacy of structural controls.

RESPONSE 19

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

COMMENT 20

The City comments that draft permit Provision X.P. should be revised to require that certification by a professional engineer of berms and other runoff control structures should take place prior to or immediately upon issuance of the permit.

RESPONSE 20

There is no rule requirement that specifies that certification of existing berms and diversion structures be done prior to issuance of the permit. Section X.A of the draft permit requires that RCS Nos. 1 and 2 be modified and allows 180 days to complete the modifications. The ED has revised Section X.P to read as follows:

> All berms and any other runoff control structures or measures necessary to convey all contaminated runoff to the RCSs, and minimize entry of uncontaminated runoff into the RCSs, must be constructed and certified by a licensed Texas profession engineer prior to use of the modified RCSs.

The ED considers 180 days after the permit is issued a reasonable amount of time to certify berms and diversion structures.

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

Additionally, the draft permit requires the Applicant to conduct weekly inspections on all control facilities, including the RCS, stormwater diversion devices, runoff diversion structures, control devices for management of potential pollutant sources, and devices channeling contaminated stormwater to the RCS; and to annually conduct a complete site inspection of the production area.

COMMENT 21

The City comments that the draft permit fails to require adequate sampling of wastewater and manure, with respect to sample collection and frequency.

RESPONSE 21

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

COMMENT 22

The City comments that the draft permit fails to account for proper management of phosphorus production. The City comments that 3,000 cows will produce 1,168 lb/day P_2O_5 which is equivalent to 426,320 lb/yr P_2O_5 and only 191,065 /yr of P_2O_5 will be applied to LMU's or third-party fields as indicated in the NMP. The City states that 235,255 lb/yr P_2O_5 is unaccounted for.

RESPONSE 22

The permit application identifies how much phosphorus is generated and the methods used to utilize or dispose of it. It is projected that 3,000 cows will generate 1,168 pounds of P_2O_5 per day. The calculation is based on a book value for phosphorus production by dairy cows developed by the American Society of Agricultural and Biological Engineers. It is part of a set of data intended for use in designing facilities to accommodate actual waste production. As long as the phosphorus being land applied or hauled-out is accounted for as required under TCEQ rules, an accounting to reflect what remains in the CAFO production area is not necessary.

The NRCS 590 Standard does not require that all LMUs be limited to the phosphorus removal rate of application. If the soil test levels for phosphorus are below 200 ppm, the crop nitrogen recommendation or some multiple of the crop phosphorus recommendation is the allowable rate, depending on the phosphorus risk index. Only when the soil test levels exceed 200 ppm on permitted LMUs, or 50 ppm on third party fields, is the crop phosphorus removal rate of application

a requirement.

COMMENT 23

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

RESPONSE 23

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

COMMENT 24

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

RESPONSE 24

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

COMMENT 25

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

RESPONSE 25

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

COMMENT 26

The City comments that the Applicant has not submitted data to justify that the predicted crop yields are reasonable and that the draft permit should be amended to require reports of the actual annual

yields of harvested crops be submitted to demonstrate that that the Applicant is using reasonable crop yields.

RESPONSE 26

The Applicant is not required to demonstrate that the crop yields are reasonable, but is required to use realistic yield goals for the location of the facility. The average annual rainfall for Erath County is approximately 31 inches. This rainfall will supply enough water to achieve the yield goals presented in the application. Water availability does not present a limitation in achieving the proposed yield goals. Furthermore, nutrients will not limit the yield goal on any field due to the application of manure and wastewater. The ED has determined that the yield goals used in the NMP are achievable.

If the proposed yield goals are not achieved, due to lower than average rainfall, crop damage, or any other crop failure, the soil test results will indicate a higher than expected nutrient value. These values will then be used to determine the maximum application rate for the following year.

Record keeping requirements at 30 TAC § 321.46(d)(8)(F) state the actual yield of each harvested crop must be recorded on a monthly basis. The information is available to the ED during field investigations. Crop removal rates are based on yields when the NMP software is used.

COMMENT 27

The City comments that the Applicant's proposed NMP does not include the approximate locations or time of year that soil tests will be taken. The City comments that this information is necessary to properly use Natural Resource Conservation Service Practice Code 590.

RESPONSE 27

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

COMMENT 28

The City comments that the basic methodology for calculating agronomic rates is flawed because the NMP fails to take into account the nutrients available to plants in the root zone to satisfy the crop requirement.

RESPONSE 28

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

COMMENT 29

The City comments that the draft permit allows land application on land exceeding 200 ppm of phosphorus. The North Bosque River TMDL Implementation Plan ("TMDL I-Plan"), dated December 2002 (p.16), provides 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." Section VII.A.8(c)(2) of the draft permit appears to be inconsistent with the TMDL I-Plan.

RESPONSE 29

The draft permit requirements are consistent with TCEQ rules relative to phosphorus reduction in waste application fields. All waste application is limited under the permit provisions to avoid significantly increasing phosphorus runoff into the North Bosque River. An LMU that reaches 200 ppm of phosphorus triggers the nutrient utilization plan (NUP) requirement. *See* 30 TAC § 321.40(k)(3) and Section VII.A.8(c). The ED prior to land application of any additional manure, sludge, or wastewater to the LMU must approve a NUP. For third party fields, there is no NUP requirement, but land application of all manure, sludge or wastewater must cease when a field reaches a phosphorus level of 200 ppm or higher.

The table below illustrates numbers from the Applicant's NMP to compare the maximum application rate versus the proposed application rate. The plan is based on a goal of maintaining soil test phosphorus levels below 200 ppm, which results in a planned application amount that is less than the maximum allowed under the East Texas Phosphorus Index (application on all LMUs, collectively). NMPs are routinely updated and the values shown below are subject to change.

LMU #	Soil Test P (ppm)	Max Annual P_2O_5 (lbs/ac)	Proposed Annual P_2O_5 (lbs/ac)	% of Max Allowable
1	96	164	105	64%
2	110	61	39	64%
3	26	380	190	50%
4	87	228	103	45%
5	156	133	83	62.5%
6	7	133	133	100%
7	37	46	0	0%
8	42	450	225	50%

Page 16 of the TMDL I-Plan for the North Bosque does read as indicated by the City. However, immediately following this statement the document states that more information is available in the section entitled "Enforcement Program." In that section of the TMDL I-Plan, it states that owners of facilities would be subject to enforcement if they performed land application on fields where soil phosphorus exceeded 200 ppm, unless land application was done according to an approved NUP.[1] This is consistent with TCEQ rules that require an approved NUP prior to any additional land application on LMUs that exceed 200 ppm of phosphorus and prohibit land application on third party fields that exceed that amount.

COMMENT 30

The City comments that the draft permit should be revised to prohibit waste application on uncultivated fields. In addition, the City comments that a specific permit provision be added to require adherence to NRCS Code 590 on third party fields if it is more restrictive and that NMPs be required for third party fields.

RESPONSE 30

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

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

Section VII.A.8(e)(5) provides the requirements for third-party fields. These provisions apply to cultivated and non-cultivated fields, with the exception of (5)(i)(B), which is specific to cultivated fields. Cultivated fields are fields used for row cropping that require the ground to be tilled, disced, or plowed to prepare for seed planting, such as corn, wheat, and oats. Non-cultivated fields are used to grow plants that do not require the ground to be tilled, disced, or plowed, such as Bermuda grass or native grasses. If the requirement in (5)(i)(B) to incorporate manure and sludge was applied to non-cultivated fields, the vegetation would be significantly damaged, thus reducing the yield goal and nutrient uptake. The ED finds that the permit has adequate provisions related to land application

1 See "An Implementation Plan for Soluble Reactive Phosphorus in the North Bosque Watershed," December, 2002, page 39:

on both cultivated and non-cultivated third-party fields.

COMMENT 31

The City comments that the draft permit should prohibit sludge application to third-party fields. The City comments that 30 TAC § 321.42(j) only allows manure, litter, and wastewater to be applied to third-party fields.

RESPONSE 31

30 TAC § 321.32(49) defines sludge as solid, semi-solid, or slurry waste generated during the treatment of or storage of any wastewater. The term includes materials resulting from treatment, coagulation, or sedimentation of waste in a RCS. 30 TAC § 321.32(56) defines waste as manure (feces and urine), litter, bedding, or feedwaste from animal feeding operations. Therefore, sludge is a product of the treatment, coagulation, or sedimentation of its parent materials, waste, and wastewater. More simply, it is modified manure and wastewater. Therefore, 30 TAC § 321.42(j), which allows dairy operators to transfer manure, litter, and wastewater to operators of third party fields is inclusive of sludge. The draft permit incorporates this rational by explicitly including the term sludge when appropriate.

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

COMMENT 32

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

RESPONSE 32

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

PPP documentation and available to TCEQ personnel during field investigations.

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

COMMENT 33

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

RESPONSE 33

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

Special Provision X.R of the draft permit, requires the Applicant to maintain a map in the PPP that identifies the location of all historical LMUs and reads as follows: "A LMU map showing historical LMUs needs to be maintained in the PPP." Fields no longer associated with the dairy facility (historical LMUs) may be used as third party fields so long as all third party requirements in TCEQ rules are met.

COMMENT 34

The City comments that the draft permit fails to provide a meaningful definition of vegetative buffers.

RESPONSE 34

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

COMMENT 35

The City comments that the draft permit fails to clearly define the measurement of the vegetative buffers and filter strips, in relation to the stream, e.g., from the banks of the stream and not the centerline of the stream.

RESPONSE 35

The ED agrees that the measurement of the vegetative buffers and filer strips should be done from the banks of a stream, not from the center of the stream. Filter strips,[2] vegetative buffers, and riparian forest buffers are, by definition, vegetated strip flow lengths. These vegetated strips can only exist as close as the normal water line or at the top of the bank.[3] Because the Applicant has to maintain the distance from where the vegetation can be established, no definition is needed. Field marking of land application areas is not required by the regulations. The ED does not find it necessary to add this definition to the permit. It is logical that the appropriate set back distance can only be measured from the land surface not from the center of the stream.

COMMENT 36

The City comments that the draft permit should be amended to include additional provisions that address control of pathogens, given the bacterial problems in the North Bosque Watershed.

RESPONSE 36

40 CFR § 122.44(k)(3) allows states to use BMPs to control or abate discharges "when numeric effluent limitations are infeasible." This also applies to bacteria. In the case of North Bosque dairies, they are only authorized to discharge in the event of a chronic or catastrophic rainfall event that exceeds the 25-year, 10-day storm event. Since discharges are not allowed except in the event of a chronic or catastrophic rainfall, there should be no bacteria discharged from the control facilities except during chronic or catastrophic rainfall events. If such an event occurs, the amount of rainfall involved and any resulting discharge will be highly variable both in volume and concentration of waste. Discharges from chronic or catastrophic rainfall events are not comparable to the continuous discharges from municipal wastewater treatment plants or industrial facilities. A discharge during chronic or catastrophic rainfall events is authorized by EPA and TCEQ rules. The BMPs in place to limit the amount on nutrients applied to the LMUs also limit the amount of bacteria that can be applied. Therefore, bacteria applied to LMUs are limited by the BMPs that limit nutrient application.

The requirements in the draft permit satisfy this requirement because the North Bosque River TMDLs are intended to achieve significant reductions in the annual average concentrations and total annual loading of soluble phosphorus in the river. The TMDLs are designed to do this by focusing

2 Filter strips are an area of herbaceous vegetation.
3 Per Practice Standard Code 391.

on controlling soluble phosphorus loading and in-stream concentrations to protect designated uses. The management measures for controlling phosphorus loading will also have some corollary effect on reducing pathogen and bacteria loading, since non-point source nutrient and pathogen loads largely originate from the same sites and materials; and are transported via the same processes and pathways. Other provisions in the rules and draft permit directed at reducing and minimizing all pollutants, including pathogens and bacteria, that are potential constituents of animal wastes include:

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

COMMENT 37

The City comments that the NMP should be revised to require wastewater sampling from both RCS No. 2 and RCS No.1.

RESPONSE 37

Section VII.A.9(a) of the draft permit requires the permittee to collect and analyze at least one representative sample of wastewater each year and use the results to determine application rates. Irrigation effluent will be withdrawn from RCS #2 under normal climatic conditions, therefore the ED has determined that wastewater shall be sampled from RCS #2.

COMMENT 38

The City comments that the draft permit combines the volume allocations for RCS No. 1 and 2 and comments that the draft permit should be revised to provide specific volume allocations for each RCS by using a stage-capacity table.

RESPONSE 38

Section X.A.(a-d) of the permit outlines the minimum volume allocation requirements for RCS #1 and #2. These required volume allocations assure that the RCS system meets rule requirements. The

permit also requires that RCS #1 and #2 be enlarged to meet the 25-year, 10-day rainfall event. Upon completion of RCSs modifications, 30 TAC § 321.42(g)(4) requires that a stage/storage table for each RCS be described in the RCS management plan and shall become a component of the PPP. As Section X.A.(a-d) meets the rules, the ED declines to require this change.

COMMENT 39

The City comments that LMU No. 5a is neither on the LMU map nor included in the NMP. The City comments that LMU No. 5a should be included in both.

RESPONSE 39

The Soil Analysis Report submitted with the application references the LMUs that were in the LMU configuration at the time the soil samples were collected. The application describes what the Applicant proposes. The application does not propose a LMU 5a, therefore, the Applicant neither listed a LMU 5a in their LMU Map, nor in the NMP. As the application is consistent, the ED does not require any change in regards to the LMUs.

COMMENT 40

The City comments that the draft permit should require the Applicant to report information to the TCEQ on third party fields regarding soil testing, areas of application, and application rates. The City also comments that the information should also be included in the annual report along with copies of contracts with applicable third party field operators, statements of compliance with permit requirements for the previous year and a summary of discharges from third party fields or a statement that there has not been any discharge from a third party field.

RESPONSE 40

30 TAC § 321.42(j) and Section VII.A.8(e)(5)(iv) of the draft permit contains the requirements for land application on third party fields in the North Bosque River watershed. It requires that records be maintained that contain the name, locations, and amounts of manure, litter, or wastewater transferred to operators of third party fields and requires that information be submitted to the appropriate TCEQ region office on a quarterly basis. *See* 30 TAC§ 321.42(j)(4). Soil sample testing on third party fields must be included in the annual report due February 15th and submitted to TCEQ. *See* Section VIII.B.7(i).

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

COMMENT 41

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

RESPONSE 41

The ED declines to make the suggested changes. Section VII.8(e)(5) of the permit directs that third party fields must follow applicable requirements for 30 TAC § 321.40, which prohibits the discharge of manure, litter, or wastewater from LMUS. In those instances, runoff would be an unauthorized discharge and subject to TCEQ enforcement action.

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

CHANGES MADE TO THE DRAFT PERMIT IN RESPONSE TO COMMENT

A special provision was added to the permit in Section X.S. The provision states:

> Within 180 days of issuance of this permit, the permittee shall ensure site-specific documentation is prepared and certified by a licensed Texas professional engineer that shows the concrete basins are free from integrity compromises such as cracking, leaking, or deterioration. This documentation shall be placed in the PPP and made available to the executive director upon request.
>
> During the annual site inspection, the permittee shall inspect the integrity of the concrete settling basin. Integrity compromises, such as cracking, leaking, or deterioration shall be repaired within 30 days of the inspection. Inspection and maintenance records for the concrete settling basin shall be maintained in the onsite PPP.

The ED has revised Section X.P to read as follows:

> All berms and any other runoff control structures or measures necessary to convey all contaminated runoff to the RCSs, and minimize entry of uncontaminated runoff into the RCSs, must be constructed and certified by a licensed Texas professional engineer prior to use of the modified RCSs.

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

Respectfully submitted,

Texas Commission on Environmental Quality

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CERTIFICATE OF SERVICE

I certify that on April 9, 2009, the "Executive Director's Response to Public Comment" for Permit No. WQ0003160000 was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk.

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