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August 3, 2009

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

VIA HAND DELIVERY

Re: Request for Hearing for Randy Earl Wyly/Wyly Dairy No. 2:
TPDES Permit No. WQ0003190000 (2402-04)

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 AUG -3 PM 4:33
CHIEF CLERKS OFFICE

Dear Ms. Castañuela:

Please accept this letter submitted on behalf of my client, the Bosque River Coalition (the "Coalition"), a Texas non-profit corporation, consisting of property owners located in the vicinity of the dairy that is the subject of draft TPDES Permit No. WQ0003190000 (the "Draft Permit") for Randy Earl Wyly/Wyly Dairy No. 2 (hereinafter, the "Dairy" or "the Applicant"). The purpose of this letter is to request a contested case hearing regarding the Draft Permit. The Coalition also hereby requests that it be placed on the mailing list so that it may remain informed on the status of the Draft Permit.

CONTESTED CASE HEARING REQUEST

Pursuant to specific requirements of a request for a contested case hearing under Title 30, Sections 55.201, 55.203, 55.205 and 50.115 of the Texas Administrative Code, those same requirements being set forth in the July 2, 2009, Decision of the Executive Director on the Draft Permit, the Coalition offers the following:

Hearing Request Requirements

General Requirements

The Coalition requests a contested case hearing. The applicant is Randy Earl Wyly/Wyly Dairy No. 2 and the Draft Permit is TPDES Permit No. WQ0003190000.

The Coalition is a Texas non-profit corporation represented by the undersigned and Lauren Kalisek. Therefore, all communications should be directed to either at the following:

KL

Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue, Suite 1900
Austin, Texas 78701
(512) 322-5810 (phone)
(512) 472-0532 (facsimile)

Requirements for a Group or Association

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

Requirements for an Affected Person

Mr. D. L. McCoy is a member of the Coalition, with property located a mere .92 miles from the property boundaries of the Dairy and 2.12 river miles from the Dairy. Mr. McCoy qualifies as an affected person under Title 30, Section 55.203 of the Texas Administrative Code with a personal justiciable interest not common to the general public in that his property fronts the same unnamed tributary of Duffau Creek into which the Dairy's discharges and runoff drain (the "creek"). Mr. McCoy acquired his property in 1964 and for many years relied upon the quality of water in the creek to water livestock and to support contact recreational activities. He was also able for many years to rely on the quality of water in the creek for picnicking and aesthetic value. Yet, he now can describe the quality of water in the creek only as "sewage." He has been forced to fence his cattle from the water in the creek because it is no longer fit for livestock watering. Similarly, the degradation of water quality in the creek has robbed the McCoy family of the recreational and aesthetic value that they once relied upon and enjoyed. Mr. McCoy is concerned that the proposed discharge authorized by the Draft Permit, and the resulting effects on water quality in the creek, threaten to further erode what little use and enjoyment he and his family are able to make of the creek along his property today. He is further concerned about other impacts that the Dairy has on his right to the quiet enjoyment of his private property. Please see the enclosed map at Attachment A for reference purposes.

Disputed Issues of Fact

The Coalition bases its request for hearing on the following disputed issues of fact. In accordance with Title 30, Section 50.115(c) of the Texas Administrative Code, the issues set forth below are disputed questions of fact that were raised during the public comment period and that are relevant and material to the decision on the application.

1. Whether retention control structures (“RCSs”) will be adequately designed, regulated, managed and certified to protect water quality under the Draft Permit (Executive Director’s Response to Public Comment (“RTC”) Nos. 1, 2, 3, 6, and 11).
2. Whether Draft Permit provisions for the storage of slurry from freestall barns will negatively impact water quality (RTC No. 4).
3. Whether the sludge accumulation rate employed by the Applicant is properly calculated, and will be adequately regulated, to protect water quality under the Draft Permit (RTC Nos. 5 and 10).
4. Whether settling basins are properly designed, regulated, and certified to protect water quality (RTC Nos. 6, 7, and 8).
5. Whether settling basin solids are properly characterized and regulated to protect water quality under the Draft Permit (RTC No. 9.)
6. Whether capacity certification and requirements for RCSs are properly described and established in the Draft Permit to ensure water quality is protected (RTC Nos. 11 and 12).
7. Whether the RCS liner sampling and embankment testing required under the Draft Permit are adequately protective of water quality (RTC Nos. 13 and 14).
8. Whether RCS construction soil qualities are appropriately articulated in the Draft Permit to ensure adequate protection of water quality (RTC No. 16).
9. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit (RTC No. 18).
10. Whether an adequate description of structural controls exists in the Draft Permit (RTC No. 19).
11. Whether the Applicant has demonstrated adequate dewatering capacity (RTC No. 21).
12. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected (RTC Nos. 22 and 23).
13. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality (RTC No. 24).
14. Whether the Draft Permit properly manages phosphorus production (RTC No. 25).
15. Whether removal of solid manure under the Draft Permit is adequate to meet water quality requirements for the North Bosque watershed (RTC No. 26).
16. Whether land management units (“LMUs”) are properly sized (RTC No. 28).
17. Whether the Applicant's projected crop yields for its LMUs and third party fields are reasonable (RTC No. 29).
18. Whether the NMP adequately identifies soil test locations and timing (RTC No. 30).
19. Whether the NMP includes an application rate that will be adequately protective of water quality (RTC No. 31).
20. Whether agronomic rates are properly calculated in the NMP (RTC No. 32).

21. Whether the Draft Permit sufficiently restricts the application of phosphorus to be adequately protective of water quality (RTC No. 33).
22. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality (RTC No. 34).
23. Whether the Draft Permit provisions regarding use of third party fields are adequate to protect water quality (RTC No. 35).
24. Whether manure and wastewater application on third party fields will be properly managed and regulated to prevent degradation of water quality (RTC No. 36).
25. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year (RTC No. 37).
26. Whether the historical waste application fields should be identified in the application or the Draft Permit (RTC No. 38).
27. Whether the Draft Permit provides meaningful definition of vegetative buffers (RTC No. 39).
28. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards (RTC No. 40).
29. Whether the Draft Permit establishes adequate reporting requirements for third party fields (RTC No. 41).
30. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields (RTC No. 42).
31. Whether the Draft Permit is sufficiently protective of environmental health as to prevent further degradation of water quality in receiving streams (RTC Nos. 1, 4, 7, 10, 12, 21, 24, 25, 26, 28, 29, 31, 32, 33, 34, 40 and 42).
32. Whether the Draft Permit will authorize activities that may adversely affect the health and well being of Coalition members, including the McCoy family (RTC Nos. 24, 25, 26, 28, 31, 33 and 40).

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

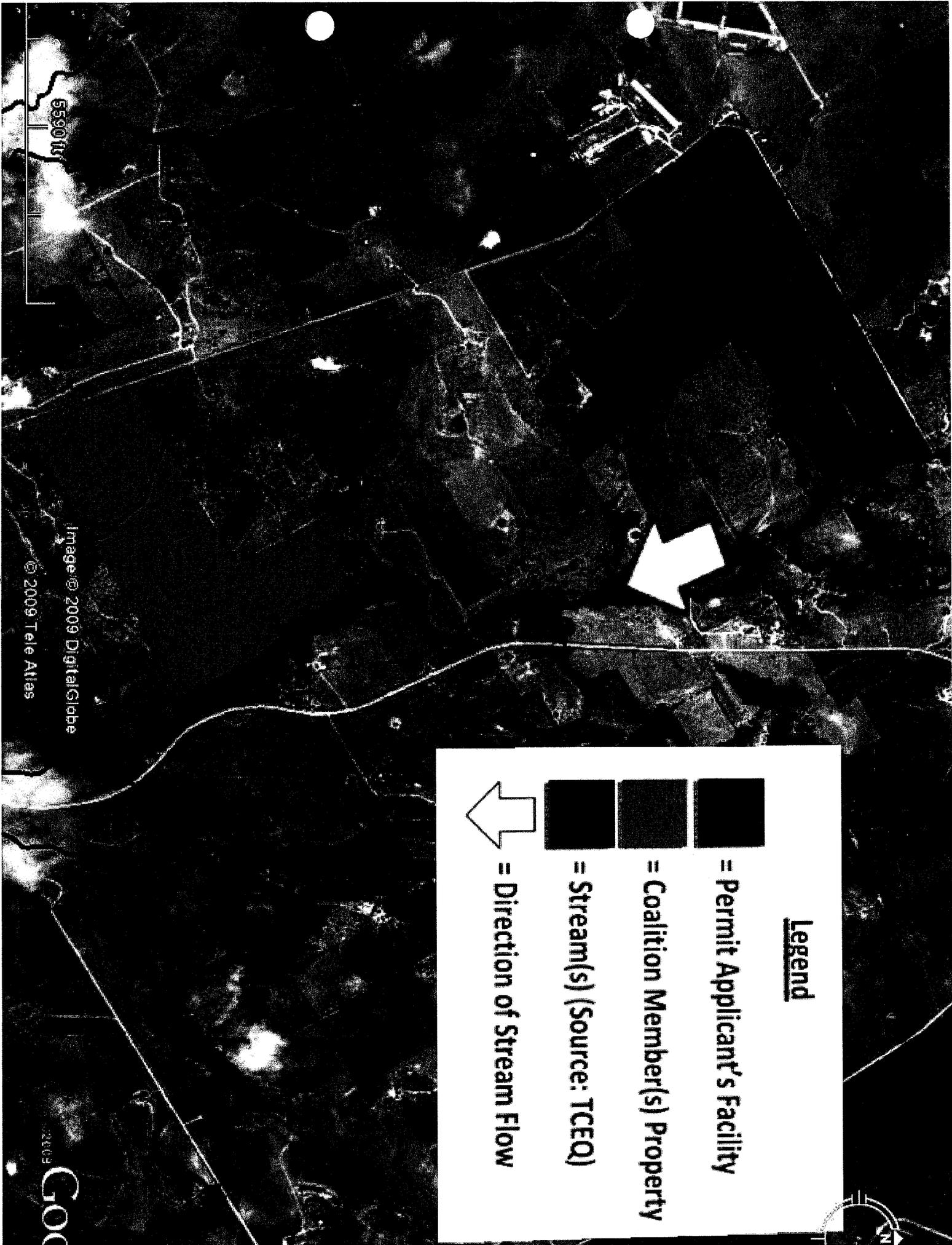
Sincerely,



Martin C. Rochelle

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ENCLOSURE

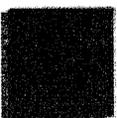
cc: Attached Mailing List (via regular mail)



Legend



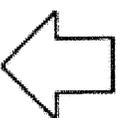
= Permit Applicant's Facility



= Coalition Member(s) Property



= Stream(s) (Source: TCEQ)



= Direction of Stream Flow



Image © 2009 DigitalGlobe

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MAILING LIST

FOR THE APPLICANT:

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December 1, 2008

Ms. LaDonna Castañuela
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12100 Park 35 Circle
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Austin, Texas 78753

VIA HAND DELIVERY
OPA
2008 DEC 1 PM 3:09
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

BY EB

Re: Comments on Draft Permit for Randy Earl Wyly/Wyly Dairy No. 2:
TPDES Permit No. WQ0003190000 (2402-04)

Dear Ms. Castañuela:

Please accept these written comments on behalf of my client, the City of Waco ("City"), concerning the above-referenced draft TPDES permit ("Draft Permit") for Randy Earl Wyly/Wyly Dairy No. 2 (hereinafter, "Wyly Dairy" or "the applicant"). Please feel free to contact me at my law firm, Lloyd Gosselink Rochelle & Townsend, P.C., 816 Congress Avenue, Suite 1900, Austin, Texas 78701, phone number (512) 322-5810, fax number (512) 472-0532, concerning any aspect of these comments or the Commission's responses to same.

WRITTEN COMMENTS

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

1. Designed Wastewater Storage Capacity

Provision X.A.4 of the Draft Permit provides that "[a]ll wastewater that cannot be applied in accordance with the nutrient management plan ("NMP") will be removed from the facility at a minimum of once per calendar year." Accordingly, this facility will be called upon to store excess wastewater for up to one year at a time. The applicant's retention control structure ("RCS") designs and volume allocations will not accommodate this additional demand for storage. If the applicant proposes to store wastewater for up to one year, then the RCSs must be designed to accommodate this additional storage, otherwise it is not clear how the applicant can demonstrate compliance with the 25-year 10-day precipitation event standard. If the applicant intends to store the indicated volumes of process generated wastewater with the allocated water balance, then these storage volumes should be based on 365 days rather than 30 days.

MW

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

Draft Permit Provision VII.A.5(a)(2)(iv) requires a stage/storage table based only on storage volumes at increments of one-foot of depth. The applicant included no stage/surface area data for the RCSs (existing and proposed) in the application. The surface area calculation of an RCS, however, is a critical component to any reliable assessment of the impacts from evaporation on the monthly water balance. The effective surface area for evaporation should be based on the average surface area during each month. Without a stage/surface area table, the applicant has no way to accurately predict evaporation losses, and, accordingly, no way to demonstrate that its proposed RCS Management Plan and water balance projections are reliable. The City suggests that Draft Permit Provision VII.A.5(a)(2)(iv) be revised as follows: “a stage/storage table for each RCS with minimum depth increments of one foot, including the storage volume and surface area provided at each depth.”

3. Review of RCS Management Plans

The Draft Permit requires the applicant to prepare an RCS Management Plan and incorporate the plan into the pollution prevention plan (“PPP”) once the RCS has been modified. The Draft Permit, however, contemplates no review of the management plan by the TCEQ before the Draft Permit is issued, nor does it provide for any meaningful staff or public review even before the management plan is implemented after permit issuance. As indicated in previous comments, the water balance and RCS Management Plan are an integral part of properly sizing the RCS. Under the current Draft Permit, however, the only time the RCS Management Plan will be subjected to any type of review is during annual facility inspections by field staff. As a practical matter, field inspectors will likely not have sufficient time, and in some instances, perhaps, the requisite engineering expertise, to properly evaluate the plan. The City recommends that the Draft Permit be revised to require, at a minimum, that the applicant submit its RCS Management Plan to the TCEQ permitting staff for review and approval prior to or upon issuance of the Draft Permit.

4. Regulation of Slurry from Freestall Barns

Draft Permit Provision X.G.3 allows the applicant to store slurry from freestall barns, but the application does not account for any such storage areas on the site map or on the waste flow chart. Slurry has an inherently liquid consistency, rendering it impossible to stack like dry manure. Thus, any storage of slurry requires a storage basin—*i.e.*, an RCS. Since the applicant has chosen not to include any RCS capacity for slurry storage in its application, no such storage will be allowed under the Draft Permit. Any slurry storage that might be constructed in the future would require the Draft Permit to be amended. Accordingly, Draft Permit Provision X.G.3 should be revised to address this significant discrepancy by stating that slurry storage is prohibited.

5. Proper Sludge Accumulation Rate from Open Lot Runoff

The applicant has calculated the sludge accumulation volume resulting from runoff based on 25 percent of the runoff from the 25-year 10-day rainfall event, but has provided no technical basis or historical data (site-specific or otherwise) in the application to justify the use of this value. If annual measurement of the sludge accumulation were required in the Draft Permit, the City would have less concern with the applicant's use of this seemingly arbitrary assumption because, as a practical matter, requiring annual measurement of sludge accumulation and correlating it with rainfall would allow the TCEQ to determine a justifiable sludge accumulation rate from open lot runoff.

6. Settling Basin Design Specifications and Capacity Certification

The application appears to be inconsistent with Title 30, Section 321.38(e)(2) of the Texas Administrative Code, which requires, without exception, that design specifications and construction specifications for each RCS be certified by a licensed Texas professional engineer. Under the TCEQ's interpretation of its CAFO program, settling basins are appropriately considered RCSs. As a practical matter, for a settling basin, as proposed by the applicant, to function properly, it must be designed with sufficient capacity to justify the applicant's projected solids removal rate. Notwithstanding Section 321.8(e)(2), the applicant has produced no certified design specifications or completed construction specifications for its proposed settling basins. The City suggests that Draft Permit Provision VII.A.3(a) be revised to make clear that such certified design specifications and completed construction specifications must be submitted for each settling basin that it proposes in the application prior to issuance of the Draft Permit.

7. Settling Rates

The applicant relies upon a settling basin solids removal efficiency of 50 percent, and cites to estimates from the Midwest Plan Service Structures and Environment Handbook for its justification. The removal efficiencies described in the Midwest Plan Service Structures and Environment Handbook, however, require settling basins (weir notch or dewatering) to meet specific design requirements. Nothing in the application demonstrates that the applicant's proposed settling basin meets the design requirements that the Midwest Plan Service Structures and Environment Handbook suggests are necessary to achieve a 50 percent removal efficiency. In fact, what the applicant proposes to use as a settling basin was not originally designed to be a settling basin at all, but instead was constructed to serve as a storage lagoon that has since been converted into a settling basin. With no demonstration in the application that the proposed settling basin was constructed using the criteria required under the Midwest Plan Service Structures and Environment Handbook to justify a 50 percent removal efficiency, it seems clear that such a removal efficiency rate is unsupported. In addition, the applicant is claiming the settling pond will remove 50 percent of the solids from open lot runoff. However, the site map clearly shows much of this runoff bypassing the settling basin and running directly into RCS

No. 2. The City suggests that the Draft Permit not be issued until the applicant amends its application to address these issues.

8. Solids Removal Schedule for Settling Ponds

Draft Permit Provision X.P. requires that the solids in the settling basin be removed on a “regular and consistent basis so as to assure attainment of the 50 percent designed removal efficiency.” Notwithstanding the City's comments above regarding the applicant's failure to submit any information in the application that would suggest such an efficiency level is feasible, the City is concerned that the provision fails to provide sufficient guidance on solids removal. Given the importance of removing solids to maintain the removal efficiency of the settling basin, the removal requirements articulated in Provision X.P. are unnecessarily vague. The Midwest Plan Service Structures and Environment Handbook referred to by the applicant recommends removing solids after every major rainfall event, or 3 to 4 times a year depending on the type of settling basin. Since the applicant is relying on removal efficiencies described in this handbook, the City believes a provision consistent with these recommendations should be incorporated into the Draft Permit: “Solids from the settling basin shall be removed after every rainfall event in excess of one inch and at a minimum of four times per year.”

9. Designation of Solids from the Settling Basin

Draft Permit Provision X.H.1 states that “for the purpose of this permit, settling basin solids manure [sic].” This appears to be a typographical error. Presumably, the TCEQ intended for the provision to read “for the purpose of this permit, settling basin solids shall be defined as manure.” Such a definition, however, would be inconsistent with Title 30, Section 321.32(49) of the Texas Administrative Code, which defines sludge as “solid, semi-solid, or slurry waste generated during the treatment of and/or storage of any wastewater. The term includes material resulting from treatment, coagulation, or sedimentation of waste in a retention control structure.” In Provision X.H.2, however, the TCEQ acknowledges this distinction between settling basin solids and manure when it requires that settled solids be sampled separately. Settling basin solids are clearly materials resulting from the sedimentation of waste in an RCS. To clarify this inconsistency with TCEQ rules, the City believes that Draft Permit Provision X.H.1. should be revised to correctly define settling basin solids as sludge

10. Adequate Monitoring of Sludge Accumulation

The buildup of sludge is one of the most common causes of reduced capacity in an RCS. The Draft Permit does not require any measurement of the sludge volume in the lagoons until three years after the date of permit issuance. As pointed out in previous comments, the City believes the sludge accumulation rates used in the application are unreliable. Additionally, the water levels in the RCS are usually kept higher than the sludge levels so that it is impossible to use the daily pond marker readings to assist in determining excessive sludge accumulation. Once a problem exists, it can take years to get it corrected and the capacity re-certified. These

shortcomings serve only to amplify the City's concerns over what it considers to be the lack of any meaningful quantification of sludge accumulation for such an extended period. The City would suggest amending the Draft Permit to require annual sludge accumulations beginning after the completion of the first year of operation under the permit.

11. Description of Capacity Certifications and Requirements

Draft Permit Provision VII.A.3(a)(2) should be revised to make clear that each RCS requires certification of both the total as-built capacity and the remaining capacity after 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." If there is no sludge accumulation, the certification should so state.

12. Absence of a Current Capacity Certification for RCS No. 1

The applicant has failed to submit a current capacity certification for RCS No. 1 with the application. The existing capacity, as shown in Draft Permit Provision VII.A.3(a)(2), is a May 1990 as-built capacity. Notwithstanding the fact that this capacity calculation is over 18 years old, it was not even certified by a professional engineer. These two facts alone pose a significant challenge to the reliability of the calculations. Since the applicant has not indicated any plans to make any changes to the size of this RCS, the City suggests that a new capacity certification by a professional engineer be required prior to issuance of this permit.

13. Liner Certification for RCS No. 1

According to the liner certification for RCS No. 1 submitted by the applicant, the certification was based only on two samples, with undisclosed locations. Without any information in the application indicating that samples were taken in both the embankments and the bottom of the RCS, it would seem that the applicant has supplied insufficient information to support a finding that there will not be leakage from the RCS. Before the Draft Permit is issued, proper certification should be performed verifying that both the embankments and bottom of the RCS meet criteria and show the location of the samples.

14. Liner Testing Specifications

In previous CAFO permits in the Bosque watershed, the TCEQ has recently required a minimum of one floor sample per acre of surface area and a minimum of one sidewall sample per each two acres of surface area in order to certify the hydraulic conductivity of a liner. In the Draft Permit, however, the TCEQ has reduced the number of samples by requiring one sample per acre of surface area to be distributed between the sidewalls and floor. The City believes that the sampling requirements in the recent CAFO permitting should be incorporated into this Draft Permit.

15. Embankment Testing Specifications

Under Title 30, Section 321.38(g) of the Texas Administrative Code, the design specifications for all RCSs must be identified in the permit, including the procedures and other protocol for liner and embankment testing. The City applauds the TCEQ on adding Draft Permit Provision VII.A.3(g)(4) concerning Liner Sampling and Analysis, with the reservations stated in the previous comment. However, while this addresses the City's concerns related to liner testing, it does not address the City's concerns regarding embankment construction testing. Specifically, the City suggests that Draft Permit Provision VII.A.3(f)(4), related to compaction testing, be revised to 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 on the last lift after completion of the liner), 4) require documentation of compaction test locations and results to be provided to the TCEQ, and 5) require continuous on-site inspection during construction.

Embankment failure could have catastrophic consequences not only to water quality but also to human life. The applicant should provide TCEQ the opportunity to review the compaction testing results so that staff is able to make an independent verification of the submitted certifications.

16. Compaction Testing Standards in Effect at the Time of Construction

Title 30, Section 321.38(e)(3) of the Texas Administrative Code requires each RCS to be constructed in accordance with the standards that are in effect at the time of its construction. Draft Permit Provision VII.A.3.(f)(4) refers to ASTM standard D6938-07. This standard has been superseded by D3938-08a and is no longer effective. To avoid this problem, the standard in Draft Permit Provision VII.A.3.(f)(4)—“D6938-07”—should be changed to read simply “D6938” and the following sentence should be added to the provision: “The ASTM standards shall be those that are in effect at the time of construction.”

17. Description of Soil Quality Standards

Under Title 30, Section 321.38(g)(1) of the Texas Administrative Code, the standards for quality of soils used in construction of the RCS are required to be specified in the permit. Absent the very general requirement that the soil be free of foreign materials, however, no such standards are articulated in the Draft Permit. The City suggests that the Draft Permit be revised to describe minimum values for the following quality of soil standards: plasticity index, liquid limit, percent passing 200 mesh sieve, and percent passing one-inch screen.

18. Draft Permit Provision Numbering

On page 8 of the Draft Permit, the provisions skip from VII.A.3(g)(3) to VII.A.3(g)(5). Obviously, the Draft Permit contains no Provision VII.A.3(g)(4). Either the provisions should be renumbered accordingly or Provision VII.A.3(g)(4) should be inserted and made available for public review and comment.

19. Conditions for Granting Extensions to the RCS Compliance Schedule

The compliance schedule in Draft Permit Provision X.A.2 allows the applicant to obtain multiple extensions to the deadline for completing RCS modifications. To narrow this potentially broad exception, the Draft Permit should be revised to include a list of specific circumstances that qualify for an extension (*e.g.*, a documented period of extended bad weather).

20. Description of Structural Controls

The Site Map of the production area (Attachment A in the Draft Permit) gives an outline of the drainage areas but does not provide an adequate description of structural controls, particularly the berms and ditches. The map shows the location of berms and ditches surrounding the RCS drainage area with a dashed line, but no information has been provided regarding the size of the berms and ditches (*i.e.*, width, height, depth).

The berms and ditches are necessary components to prevent contaminated runoff from leaving the site. While a field inspector will typically be able to observe whether berms and ditches are present and the dimensions of each, most field inspectors typically have not been sufficiently trained to determine whether structural controls are adequate to contain the flows. The inspector certainly could not do this without performing the necessary surveying and making the necessary engineering calculations first, something that will rarely, if ever, take place in a field inspection. Therefore, some means must be given to the inspector to evaluate compliance. Additionally, if the operators are not given an adequate description of structural controls, the operators will not be able to determine their own compliance and how to make repairs if, for example, a berm deteriorates over time as a result of settling, the actions of a careless worker, or runoff erosion. The applicant should be required to describe in the application each of these berms and ditches in sufficient detail with respect to size (*i.e.*, width, height, depth) and construction method so that TCEQ inspectors can determine if the facility is in compliance and so that the operator can make adequate repairs if necessary. The Draft Permit should then be revised to include these specific structural control descriptions.

21. Absence of Accurate Site Map

On the Site Map included in the application, the applicant indicates that drainage from the pen area (based on the drainage arrows) will flow toward proposed RCS No. 2. The applicant uses a dark dashed line presumably to indicate the presence of a berm or embankment

that prevents flow from entering into the settling basin. However, the Site Map also contains a line marked "berm" that appears to block flow into RCS No. 2. The Site Map does little to describe where flows are projected to migrate once they reach this point on the property. If berms and drainage patterns are different before and after construction of proposed RCS No. 2, then the applicant should be required to produce two separate site maps (before and after) with its application.

22. Adequacy of Dewatering Capability

The applicant has indicated that it has a dewatering capacity of 330 gpm and 250 gpm. Presumably, these capacities refer to the center pivot system and its walking big gun, respectively, but the application provides no such clarification. In addition, the applicant has made no demonstration in its application that this dewatering capacity is adequate. The application contains no information regarding the pump models, their horsepower, or dynamic head for these pumping systems. Without this information, it is difficult to verify any of the pumping capacities suggested in the application. The stated pumping capacity is more than likely a rated flow and does not take into account head losses in the piping and irrigation nozzles. Title 30, Section 321.38(f) of the Texas Administrative Code requires that "[a]n irrigation system or other liquid removal system used by an AFO must be designed to ensure that the system is capable of dewatering the RCSs on a regular schedule." The applicant has made no attempt in the application to demonstrate that it actually has the dewatering capacities it claims. The applicant should be required to provide locations of the pumps and transfer lines, rated capacities of the pump, head losses in the transfer lines and irrigation nozzles, and actual delivery capacities in its application. Additionally, before issuing the Draft Permit, the TCEQ should verify the adequacy of the dewatering equipment by requesting the necessary information to determine the actual delivery rate of this equipment and how it is designed and operated.

23. Annual Facility Inspection Report

Draft Permit Provision VII.A.10(a)(5) requires an annual site inspection. However, this provision does not require a report of the findings to be prepared and sent to the TCEQ, as required by Title 30, Sections 321.46(c)(2) and (e)(2) of the Texas Administrative Code. The TCEQ, in previous responses to comments, has stated that these rules do not require these records to be submitted to TCEQ. Rule 30 TAC Section 321.46(c)(2) states "[a] complete inspection of the facility, including the CAFO, the associated control facilities, and LMUs shall be completed by the CAFO operator and a report documenting the findings of the inspection made at least once per year." Section 321.46(e)(2) states "CAFO operators shall provide all other reports required by this subchapter to the Office of Compliance and Enforcement, Enforcement Division." It is unclear how the TCEQ can interpret these rules to not require the submission of the annual site inspection report to the Office of Compliance and Enforcement. The requirement to send this report to TCEQ's Office of Enforcement and Compliance should be added to Draft Permit Provision VII.A.10(a)(5).

24. Five-Year Evaluation Report

Draft Permit Provision VII.A.10(b) requires the Five-Year Evaluation Report to be kept in the PPP. However, this provision does not require it to be sent to TCEQ as required by Title 30, Section 321.46(e)(2) of the Texas Administrative Code. Section 321.46(e)(2) states “CAFO operators shall provide all other reports required by this subchapter to the Office of Compliance and Enforcement, Enforcement Division.” As discussed above, it is unclear how these rules can be interpreted as not requiring the Five-Year Evaluation to be submitted to the Office of Compliance and Enforcement. The requirement to send this report to TCEQ’s Office of Enforcement and Compliance should be added to Draft Permit Provision VII.A.10(b).

25. Five-Year Evaluation to Certify the Adequacy of Structural Controls

As noted above, Draft Permit Provision VII.A.10(b) requires a Five-Year Evaluation to be kept in the PPP. This evaluation requires that a licensed Texas professional engineer review the existing engineering documentation, complete a site evaluation of the structural controls, review existing liner documentation, and complete and certify a report of his or her findings. However, it does not require the engineer to certify the adequacy of the structural controls, which would seem to be the purpose of this five-year evaluation. In addition to simply certifying a report of findings, the Draft Permit should require the applicant's engineer to certify that the applicant's structural controls are adequate to prevent unauthorized discharges. Otherwise, the mere fact that a report of findings was prepared might lead to the incorrect conclusion that the controls were adequate. For example, the engineer might certify that berms were present that were 9 inches in height. This would not, however, provide any information as to whether the berms were adequate. The TCEQ in previous responses to comments has stated that “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.” Unfortunately, the application contains little engineering documentation on the facility—particularly the berms—to serve as a basis for comparison. The City suggests that the applicant be required to submit a certification of structural control adequacy.

26. Certification of Structural Controls Prior to Issuance of Permit

As noted above, Draft Permit Provision VII.A.10(b) requires a licensed Texas professional engineer to complete a site evaluation of the structural controls once every five years and certify a report of findings. The Draft Permit does not, however, require a certification that the structural controls are adequate prior to issuance of the permit. Such a certification was required under the existing permit, but the certification was apparently never performed. It bears repeating that the structural controls, particularly the berms, are an integral part of the facility necessary to prevent contaminated runoff from leaving the site. If the berms are not sized properly, runoff will leave the facility during significant rainfall events. Without any certification of structural control adequacy by an engineer, it is practically impossible to determine by any reliable measure that all berms have been constructed competently and are

functioning properly to prevent contaminated runoff from leaving the facility. The applicant should be required to provide a current certification of structural controls before this Draft Permit is issued.

27. Failure to Perform Adequate Sampling of Wastewater and Solids

The Draft Permit requires only one annual sample to be collected for wastewater, "dry" manure, slurry, and settling basin solids. The entire NMP and future application to third-party fields are based on these single annual samples. These single samples, if not representative, are likely to substantially underestimate phosphorus loading to a field. Wastewater is typically sampled from the surface of RCSs. Taking a sample from the surface of a quiescent RCS will result in significantly different sample concentrations than taking it from the irrigation pipeline. When the irrigation pumps in the RCSs are operating, sludge in the bottom of the RCSs is agitated and becomes mixed with the wastewater. This sludge agitation has often been cited by operators as a reason that sludge removal may not be needed as often as predicted. Since this sludge contains high levels of phosphorus, the wastewater that is actually being used to irrigate the fields contains much higher levels of phosphorus than is measured in the single annual surface sample, undermining the reliability of the assumptions used in the NMP. Additionally, the concentration of phosphorus in the RCS varies according to the antecedent rainfall or drought conditions that affect nutrient dilution or concentration. To provide a more realistic estimate of what is actually being applied to the field, RCS samples should be obtained from the irrigation pipeline downstream of the pump rather than from the surface of the RCS.

Additionally, RCS samples should be taken much more often (*e.g.*, once during each irrigation event). Wastewater treatment plants, by comparison, often take samples weekly, if not daily. At the very least, the applicant should be required to collect one sample per week or month when irrigating. An average of the sampling events over the year could be used in updating the permittee's NMP.

The City has similar concerns with respect to the manure, slurry, and settling basin solids. Taking only annual samples from these solids can result in significant errors in calculating the amount of nutrients applied to the land. Moisture content plays an important role in calculating the amount of nutrients applied. If the sample is not taken concurrently with the application of the solids, significant errors may exist when calculating the application rates. If the solids are sampled while having a high moisture content and then applied much later when they have a much lower moisture content, the calculated nutrient application rate will be significantly underestimated. A requirement similar to Draft Permit Provision X.M for sludge, which requires an analysis for each haul-off, should be required for manure, slurry, and settling basin solids.

28. Management of Phosphorus Production

The manure production tables in the application indicate that the total phosphorus produced by the proposed 2,950 cows is 795 lb/day P₂O₅. This is equivalent to 290,175 lb/year

P₂O₅ (795 x 365). The NMP (dated November 18, 2006) indicates that the amount of phosphorus to be applied to the LMUs is only 4,578 lb/year P₂O₅. This leaves 285,597 lb/year P₂O₅ in the manure, slurry, sludge, and wastewater that must be managed. Neither the application nor the Draft Permit provide any specific guidance concerning the location of where these solids and wastewater may be applied.

Although listed as one of a number of possible options, there is no indication that any of the manure will actually be transported out of the watershed. This means that a total of 285,597 lb/year P₂O₅ (98.4 percent) from manure, slurry, sludge, and wastewater will be potentially managed on third-party fields within the North Bosque River watershed with no controlling NMP or any other meaningful institutional control or oversight. If TCEQ generously assumes that all 285,597 lb/year P₂O₅ is applied to intra-watershed third-party fields with soil concentrations of less than 151 ppm P, then approximately 2,100 additional acres (assuming three coastal cuts) will be subjected to phosphorus applications at rates reaching twice the crop phosphorus removal rate. An application rate of twice the crop removal rate will result in an increase of the soil P in these additional acres of 13 ppm per year. The cumulative impact will be extraordinary. But these additional acres will be virtually unseen (and hence unregulated) by TCEQ inspectors.

The City requests that the TCEQ reconsider its decision to allow 98.4 percent of the phosphorus (285,597 lb/year P₂O₅) to be applied within the watershed onto fields that have less oversight than LMUs located at the facility. Failure to plan for proper management of this phosphorus will lead to excess and unmanaged phosphorus distribution within the watershed, resulting in further degradation of water quality in the North Bosque River and Lake Waco.

29. Failure to Remove 50% of the Solid Manure from the Watershed as Modeled in the TMDL

The TMDL for the North Bosque watershed recommends removal of 50 percent of the manure in order to meet the water quality goals. Both the CDM Erath County Animal Waste Management Study performed for BRA in September 1998 and the SWAT modeling that was done in support of this TMDL assume removal of 50 percent of the solid manure (38.1 percent of the total manure production) from the watershed. If this manure is not removed from the watershed, the water quality modeling shows that the water quality goal will not be met. Although there are several disposal options in the Draft Permit for the manure, it still allows 100 percent of the manure to be applied within the watershed. The Draft Permit contains no requirement that the applicant remove 50 percent of the solid manure generated by the proposed operation. Based on the NMP (dated November 18, 2006) submitted in the application, the applicant is proposing to apply 100 percent of its total manure production offsite, presumably to third-party fields within the Bosque watershed. The applicant, however, has not provided any information to demonstrate how the application of 100 percent of its manure within the watershed is consistent with the water quality modeling underlying the North Bosque River TMDL.

30. Date for NMP

Draft Permit Provision VII.A.8(a) indicates that the NMP submitted in the application is to be implemented upon issuance of the permit. The applicant, however, has submitted multiple NMPs for this facility, making it difficult to determine which NMP will be the operative plan that should be reviewed. In its previous response to comments, TCEQ has stated that the latest version of the NMP will be maintained in the permit file. However, it has been the City's experience that portions of permitting files maintained by the TCEQ are missing or may be misplaced, which is understandable given the sheer volume of public records maintained by the agency. Because the inclusion of the date of the most recent version of the NMP in the permit seems like such an easy solution to this potential problem, the City is unclear as to why the TCEQ would oppose the suggestion. Such inclusion will provide for better recordkeeping not only for the permittee, but for the agency as well. The City suggests revising the Draft Permit to simply indicate the date of the NMP that will be effective upon permit issuance, thus removing any question about which NMP this facility will operate under for the year following issuance of the permit.

31. LMU Size Limits

Texas NRCS Code 590 requires LMU sampling to be conducted in accordance with Texas A&M University ("TAMU") guidance.¹ According to TAMU guidance, LMUs are required to be 40 acres or less in size. One of the applicant's LMUs—LMU No. 2—exceeds this standard by two acres. In order to more consistently follow the requirements of Title 30, Section 321.42(i)(5)(A) of the Texas Administrative Code, LMU No. 2 should be subdivided appropriately and new soil sampling should be conducted on the smaller LMUs. The applicant should then prepare a revised LMU map and NMP reflecting the newly formed LMUs.

32. Justification of Crop Yields

The applicant has made no demonstration that its crop yield assumptions are realistic for the soil type at issue even though the PPP has for years required the operator to maintain records of the actual annual yield of each harvested crop. Texas NRCS Code 590 suggests that the NMP be based on realistic yield goals for the crops.² To ensure compliance with Title 30, Section 321.42(i)(5)(A) of the Texas Administrative Code, the applicant should be required to submit historical data that shows its actual annual yields of harvested crops from the applicable fields so that it may demonstrate the reliability of its crop yield assumptions.

¹ p. 590-2.

² p. 590-7.

33. Documentation of Soil Test Location and Timing

Texas NRCS Code 590 requires that the NMP include the approximate locations where soil tests will be taken as well as the time of year that sampling will be conducted.³ The applicant did not provide any such information in the NMP it included with its application. To ensure consistency with Title 30, Section 321.42(i)(5)(A) of the Texas Administrative Code, the applicant should be required to include this important information in its NMP.

34. Sufficiency of Irrigation Area

The applicant indicates that 48.8 acre-feet of wastewater must be applied annually in order to maintain its water balance. Applying at the maximum rate allowed under NRCS Code 590, the applicant has indicated that only 43.8 acre-feet can be applied onsite, however. The remaining 5 acre-feet must be applied offsite, presumably on third-party fields. These volumes are based on the average annual amount of rainfall and do not account for the rainfall that could occur in a year with above average precipitation, including the 32.7 acre-feet that would result if the 25-year 10-day rainfall event occurred. The applicant's approach—basing application ability on a 100 percent application rate with offsite land still required—means that the NRCS Code 590 requirements cannot be met in wet years. In a well-planned NMP, the CAFO would typically be applying at well below the maximum rate, thereby accommodating wet years by increasing the application rate to 100 percent of the maximum. The City suggests that the applicant be required to demonstrate that it can meet the NRCS Code 590 requirements in years with above-average precipitation.

35. Agronomic Rate Calculation

The basic agronomic rate calculation methodology being employed by the applicant in the NMP is flawed because it does not account for available plant nutrients in the root zone to satisfy the crop requirement. Instead, the NMP allows application of the annual crop requirement, regardless of the actual soil nutrient content, until the soil reaches a concentration of 200 ppm P. Even then, the NMP continues to allow nutrient application despite the presence of more than seven times the amount of nutrients necessary for optimum growth. Relying on the phosphorous index to account for this problem is flawed, as well. The phosphorus index does not take into account soil nitrogen. More importantly, the phosphorus index does not take into account the increase in soil phosphorus once the soil phosphorus exceeds 60 ppm P.

As an analogy, the TCEQ more properly makes the agronomic rate calculations when determining agronomic rates for the application of biosolids. For biosolids permit applications, the TCEQ requires that the agronomic rate calculations take into account the nutrients in the soil by taking the crop requirement and subtracting the nutrients available in both the 0-6" and 6-24" soil depths for the most recent year. Only the amount of nutrients needed to satisfy the overall

³ p. 590-7.

crop requirement for that year is allowed to be applied. If the amount of nutrients in the soil exceeds the crop requirement, no additional nutrients can be added during that year. The nutrients in biosolids are not fundamentally any different from the nutrients in dairy waste. There is no reason that the applicant should calculate agronomic rates any differently. The Draft Permit should allow application of only that quantity of nutrients that will benefit optimum crop production (*i.e.*, beneficial use), as required by the rules.

Plant available nitrogen, not phosphorus, is the nutrient that most often needs to be added as fertilizer to increase crop yields. Dairy waste is composed of a considerable phosphorus component. The fact that crops need additional nitrogen does not justify also adding phosphorus in watersheds that are impaired for phosphorus. Adding phosphorus in these cases is detrimental, not beneficial. If the crops need additional nitrogen and no phosphorus, the nitrogen should be added using a source that is low in phosphorus, such as commercial fertilizer.

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

The North Bosque River TMDL Implementation Plan dated December 2002 states that formal enforcement action will result if CAFOs “apply waste or wastewater to a WAF that has been documented to have exceeded 200 parts per million phosphorus in Zone 1 of the soil horizon.”⁴ Draft Permit Provision VII.A.8(c)(2) would appear to undermine this enforcement potential by allowing application to continue as long as an NUP has been prepared and approved by the TCEQ. Soil phosphorus concentrations can continue to rise as long as they do not exceed 500 ppm. Even above 500 ppm, application can continue as long as the NUP contains a phosphorus reduction component. To maintain consistency with the North Bosque River TMDL, application of waste and wastewater to fields in excess of 200 ppm, and certainly 500 ppm, should be prohibited. As a minimum precaution, fields in excess of 200 ppm should be required to have an NUP containing a phosphorus reduction component subject to Draft Permit Provision VII.A.8(c)(5).

In addition, it is worth noting that the 200 ppm phosphorus is seven times the amount of phosphorus needed for optimum growth of the proposed crops (*i.e.*, seven times the agronomic need). The rules require NUPs to ensure the beneficial use of manure, litter, or wastewater. TCEQ rules define “beneficial use” to mean the “application of manure, litter, or wastewater to land in a manner that does not exceed the agronomic need or rate for a cover crop.” Applying waste to soil that contains seven times the agronomic need is not a beneficial use under the pertinent standards.

37. Regulation of Manure Application on Third-Party Fields

Draft Permit Provision VII.A.8(e)(5)(i)(B) requires the applicant to incorporate manure on cultivated fields within 48 hours after land application. It provides no restrictions, however,

⁴ p.16.

regarding application of manure on non-cultivated fields. Because of the significant damage to vegetation and reduction in yield and nutrient uptake that is typically associated with incorporation on non-cultivated fields, the City believes the application of manure on non-cultivated fields should be prohibited. The City would encourage the TCEQ to amend the Draft Permit to prohibit the applicant from applying manure on non-cultivated fields within 500 feet of a stream as a minimum precaution, particularly since no buffers are required for third-party fields.

38. Regulation of Wastewater Application on Third-Party Fields

According to the NMP, the applicant plans to apply 61 acre-inches (over 1.6 million gallons) of wastewater off-site, presumably to third-party fields. There does not appear to be a way that wastewater can be applied using any portion of the applicant's proposed irrigation system, since using this type of system would require the applicant to exercise a level of control over the third-party field (*e.g.*, control of the pumping rate from the RCS) that is prohibited under the third-party fields rules. The Draft Permit should be revised to prohibit application of wastewater on third-party fields unless the third-party field owner transports the wastewater from the applicant's facilities by truck.

39. Applicability of NRCS Code 590 Requirements on Third-Party Fields

Draft Permit Provisions VII.A.8(e)(5)(i)(C-E) should be revised to include a statement that the application rate is not to exceed the standards articulated in NRCS Code 590. Although the criteria for application rates on third-party fields are more restrictive than for LMUs in most instances, it is possible for third-party fields to meet the requirements of Draft Permit Provisions VII.A.8(e)(5)(i)(C-E) yet fail to meet the requirements of NRCS Code 590. For example, NRCS Code 590 requires that the application rate never exceed the annual crop P requirement in fields with a P-Index rated of "Very High." Draft Permit Provision VII.A.8(e)(5)(i)(C) allows application at the nitrogen crop requirement rate when the field is less than 50 ppm P, irrespective of the P-index. Adherence to NRCS Code 590 should be required in the circumstances where it provides the more restrictive standard. There are many instances that justify a more restrictive third-party field application rate than what the NRCS Code 590 standard suggests for LMUs, but there is no circumstance that would justify a less restrictive third-party field application rate. It is unreasonable to allow application at the nitrogen rate to a field with a Very High P-index rating even if it does have less than 50 ppm P. Fields with a Very High P-index have the highest vulnerability as sources of P loss in surface runoff.

40. NMP for Third-Party Fields

According to Draft Permit Provision VII.A.8(e)(5)(i)(A), no NMP is required for third-party fields. Without preparing an NMP, it would seem that the applicant would have difficulty meeting the requirements of Draft Permit Provisions VII.A.8(e)(5)(i)(C-E) since an NMP is the planning tool that is necessary to determine the appropriate application rates. An NMP should be

required even if the criteria for the NMP are different than those in NRCS Code 590. If an NMP is not going to be required, it would be helpful if TCEQ could explain how the appropriate application rates will be determined.

41. Reporting Crop Yields on Third-Party Fields

While Title 30, Section 321.46(d)(8)(F) of the Texas Administrative Code requires recording the actual yield of each harvested crop in the PPP, it does not require such records to be reported. Similarly, Draft Permit Provision VIII.B.7 does not require reporting of this information in the annual report. Draft Permit Provision VII.A.8(e)(5)(iv) should be revised to include a requirement that records of crops and crop yields on third-party fields be submitted to the TCEQ quarterly. In addition, Draft Permit Provision VIII.B.7 should be revised to include a requirement that records of crops and crop yields be submitted to the TCEQ in the annual report. Otherwise, the phosphorus crop removal rates cannot be calculated, making compliance with the phosphorus application rate limitations extremely difficult to ascertain.

42. Sludge Application to Third-Party Fields

Draft Permit Provision VII.A.8(e)(5) should be amended to prohibit sludge application to third-party fields to ensure consistency with Title 30, Section 321.42(j) of the Texas Administrative Code.

43. Sustainability for the Term of the Permit

The applicant's proposed NMP addresses only the first year of the five-year permit term. The TCEQ should require the applicant to prepare a five-year NMP that shows the impacts of all nutrient management issues over the entire term and whether the operation is sustainable. The Draft Permit should establish an overall maximum application rate that allows the facility to operate in a sustainable manner over the five-year term of the permit. An annual NMP could then be used to make adjustments to the application schedule for each year, as well as individual field applications, based on annual soil sampling and crop production.

While it is true that the NMP may change each year based on site-specific sampling results, a term-based NMP would provide a much more reasonably accurate predictor of what will occur in the fields (assuming the wastewater and manure sampling is representative). The applicant should be required to demonstrate that, based on projected application rates, it has enough land to sustain its operation for the five-year term of the permit.

44. Identification of Historical Waste Application Fields

Title 30, Section 321.42(k) requires soil samples to be taken in historical waste application fields as well as active LMUs. The analytical results of these soil samples are required to be furnished to the TCEQ. Although Draft Permit Provision X.R. requires a map of

the historical fields to be maintained in the PPP, the historical fields have not been identified in the application or in the Draft Permit. The applicant has offered no justification for not including the historical fields in the application. To avoid any confusion over the naming, numbering, and location of waste application fields, the applicant should be required to provide such information in the application, which should them be included in the Draft Permit.

45. Definition of Vegetative Buffers

Draft Permit Provision X.D. requires that the permittee install and maintain buffers according to NRCS standards. While the NRCS does have practice standards for “filter strips” (Code 393), the NRCS has no practice standards for “vegetative buffers.” The buffers specified in the Draft Permit contain both filter strips and a “vegetative buffer setback.” Without a definition and standard for “vegetative buffer,” the term is unnecessarily ambiguous. The TCEQ has previously indicated that it considers the phrase “vegetative buffers” in the North Bosque River watershed to mean either Filter Strips as defined by NRCS Practice Code 393 or Riparian Forest Buffers as defined by NRCS Practice Code 391. This interpretation should be incorporated into the Draft Permit as a definition to resolve what otherwise is a glaring ambiguity. Without a specific definition and criteria for “vegetative buffer,” the City believes that enforcement of TCEQ's "interpretation" will be difficult. The City suggests that the following sentence be incorporated into Draft Permit Provision X.D: “A vegetative buffer shall meet the criteria of Riparian Forest Buffers defined by NRCS Practice Code 391 or the criteria of Vegetative Filter Strips as defined by NRCS Practice Code 393.”

46. Non-Attainment of Bacterial Water Quality Standards

This proposed operation discharges into Segment No. 1226, which is currently listed on the State's 303(d) list (impaired and threatened waters) for non-attainment of bacteria water quality standards. The applicant, however, has failed to demonstrate in the application how its proposed operation will accommodate attainment of bacteria water quality standards. No attempt by either the applicant or the TCEQ has been made to address how the bacterial problems that exist in the North Bosque River watershed will be corrected other than by the single general statement on p.11 of the Fact Sheet which states that “the RCS storage capacity requirements, nutrient management practices, increased TCEQ oversight of operational activities, and requirements of the TMDL Implementation Plan, which are incorporated into the draft permit, are designed to reduce the potential for this CAFO to contribute to further impairment from bacteria.” With respect to the first element—the RCS storage capacity requirements—an increased RCS storage capacity requirement should decrease the amount of bacteria discharged during chronic or catastrophic rainfall events as the TCEQ has indicated. However, chronic and catastrophic rainfall events are not typical in this region, and neither the applicant nor the TCEQ has offered any quantification of the reduction, irrespective of whether the reduction would be enough to eliminate the impairment. The majority of the occurrences of non-attainment of bacterial water quality standards occurs during non-chronic and non-

catastrophic rainfall events, so it would seem only prudent to address non-attainment during these other conditions as well.

With respect to the second element—nutrient management practices—nothing in the application or the Draft Permit suggests that nutrient management practices will have any effect on bacteria. While bacteria and pathogen loads originate from the same sites and materials as nutrients and are transported via the same streams and rivers, the processes and removal mechanism for bacteria are far different from those for nutrients. Much of the nutrients from CAFOs like the application's proposed operation are removed by harvesting growing crops to which the nutrients have been applied. There has been no demonstration that bacteria are removed by growing crops. There has been no demonstration to what extent bacteria might be captured by the soil or “filtered out” in grass. Bacteria undergo different processes in the streams and rivers. They are not removed by algae, and bacteria have a potential for regrowth. Additionally, a look at the NMP submitted for this facility indicates that the application rates will be limited based on the nitrogen concentrations in the wastewater just as they have been in the past. Therefore, there is no additional limitation on the amount of bacteria being applied over what has been allowed under the previous permit.

With respect to the third element—increased TCEQ oversight of operational activities—current TCEQ oversight of operational activities is certainly commendable and sorely needed, but enforcement is a reactive measure. There has been no demonstration by the TCEQ of what specific oversight will eliminate the bacteria non-attainment and how this has been quantified.

With respect to the fourth and final element, the TMDL Implementation Plan addresses only phosphorus, not bacteria.

47. Reporting for Third-Party Fields.

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

⁵ Draft Permit VII.A.8(e)(5)(iv).

compliance will provide for better enforcement. For example, such provisions could include revision of VII.8.(e)(5)(iv) to state that:

[t]he permittee shall submit records to the appropriate regional office quarterly that contain the name, locations, and amounts of wastewater, and/or manure transferred to operators of third-party fields, a copy of any initial or annual soil analyses, land application locations, dates and times, and nutrient concentration of applied materials, rates, acreage of application area, and crops and crop yields for the preceding quarter.

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

48. Control of Third-Party Fields

The Draft Permit prohibits discharges except as provided by the permit and federal regulations. The Draft Permit authorizes discharges from RCSs whenever "chronic or catastrophic rainfall events or catastrophic conditions cause an overflow."⁶ The Draft Permit also prohibits the "drainage of wastewater, sludge and manure from an LMU" unless authorized under certain conditions.⁷ However, the Draft Permit, although allowing the application of waste on third-party fields, is silent with respect to drainage or discharges from third-party fields. It is important that the Draft Permit clearly state that drainage or discharges of wastewater or manure from third-party fields is prohibited. Otherwise, there does not appear to be any control regarding the over-application of waste on third-party fields. Better control of third-party fields is very important because such fields do not benefit from the use of RCSs, NMPs, or other protections imposed on LMUs. In addition, the Commission should consider prohibiting the applicant's further use of any third-party field if it is determined that it has ever disposed of waste on a third-party field when the most current soil test reflects phosphorous concentrations of greater than 200 ppm or the application rate established by permit for a third-party field is ever exceeded. The use of third-party fields should be considered to be a privilege that should be revoked if it is ever abused.

⁶ A "chronic or catastrophic rainfall event" is defined at 30 Tex. Admin. Code § 321.32(10) as a "series of rainfall events that do not provide opportunity for dewatering a retention control structure and that are equivalent to or greater than the design rainfall event or any single rainfall event that is equivalent to or greater than the design rainfall event."

⁷ Draft Permit VII.A.8.(f)(2)(i).

Ms. LaDonna Castañuela
December 1, 2008
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The City of Waco hereby requests that the Executive Director consider these comments in evaluating the Draft Permit which has been proposed to Randy Earl Wyly/Wyly Dairy No. 2. The City appreciates the opportunity to submit these comments and the consideration it hopes the Executive Director and Commission staff will give to them.

Sincerely,



Martin C. Rochelle

MCR/ldp
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cc: Applicant Randy Earl Wyly/Wyly Dairy No. 2
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Ms. Leah Hayes, City Attorney, City of Waco
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