

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
Protecting Texas by Reducing and Preventing Pollution

September 25, 2009

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

Re: **RANDY EARL WYLY**
TCEQ DOCKET NO. 2009-1245-AGR

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Request for Hearing in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Blas J. Coy, Jr.", written over a circular stamp or mark.

Blas J. Coy, Jr.
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. Box 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

P.O. Box 13087

Austin, Texas 78711-3087

512-239-1000

Internet address: www.tceq.state.tx.us

TCEQ DOCKET NO. 2009-1245-AGR

APPLICATION BY	§	BEFORE THE
RANDY EARL WYLY/ WYLY DAIRY NO. 2	§	TEXAS COMMISSION ON
TO AMEND TPDES PERMIT NO. WQ0003190000	§	ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO REQUEST FOR HEARING**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) files this response to the request for a contested case hearing.

I. INTRODUCTION

Randy Earl Wyly/Wyly Dairy No. 2 (Dairy or Applicant) has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment of Texas Pollutant Discharge Elimination System (TPDES) permit no. WQ0003190000 for a Concentrated Animal Feeding Operation (CAFO) to authorize the applicant to expand an existing Dairy facility from 950 head to a maximum capacity of 2,950 head, of which 1,800 would be milking cows.

The dairy is located on the west side of County Road 209, approximately 4 miles south of the intersection of U.S. Highway 67 and County Road 209. The intersection is approximately 7 miles southeast of Stephenville, in Erath County. The facility is located in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River Basin.

The application was received by the TCEQ on November 27, 2006 and declared administratively complete on January 15, 2008. The first notice was published January 21, 2008 in the *Stephenville Empire-Tribune*. The second notice was published September 16, 2008 in the *Stephenville Empire-Tribune*. The public comment period closed December 29, 2008. Comments were timely filed by the City of Waco. The Chief Clerk of the TCEQ mailed the Decision of the Executive Director and the Executive Director's Response to Comments (RTC) on July 2, 2009. A timely hearing request was submitted by Martin Rochelle and Lauren Kalisek, Attorneys, on behalf of the Bosque River Coalition. The Request was received by the Chief Clerk's Office on August 3, 2009.

For the reasons set out below, OPIC recommends that the hearing request of the Bosque River Coalition be granted.

II. ANALYSIS

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999). Under 30 Texas Administrative Code (TAC) § 55.201(d), a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application.

Under 30 TAC § 55.203(a), 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Subsection (b) states that governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons. Subsection (c) provides relevant factors to be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;

- (2) distance restriction or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

As provided by 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;
- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

Section 55.209(e) states that a response to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;

- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

B. Determination of Affected Person Status

In its hearing request the Bosque River Coalition (Coalition) states it is a Texas non-profit corporation whose purposes include the protection and enhancement of water quality in the Bosque River watershed. It is an organization consisting of property owners located in the vicinity of the Dairy. The request asserts that the Coalition's interest in protecting the water quality in the Bosque watershed is germane to the organization's purpose. The Coalition identifies Mr. D.L. McCoy as a member of the Coalition who qualifies as an affected person and would otherwise have standing to request a contested case hearing in his own right.

The Coalition states that Mr. McCoy owns property located less than one mile from the Wyly Dairy property and approximately 2.12 river miles from the facility. Mr. McCoy's property fronts the same unnamed tributary of Duffau Creek into which the Dairy's discharges and runoff drain. The requester states that Mr. McCoy has owned this property since 1964. Mr. McCoy and his family had used the creek to picnic and for recreational purposes and for the watering of his livestock but can no longer do so. Mr. McCoy has also had to fence his cattle from the creek because it is no longer fit for livestock watering. The request states that the quality of water in the creek has deteriorated to the point that it can only be described as "sewage". He is concerned that the proposed discharge as authorized by the Draft Permit and its resulting impact to water quality in the tributary will further erode his and his family's use and enjoyment of the stream which runs along his property. The Coalition concludes that Mr. McCoy qualifies as an affected person with a personable justiciable interest in this application not common to members of the general public.

Chapter 26 of the Texas Water Code places a duty on the TCEQ to maintain and protect the quality of water in the state.¹ With respect to CAFOs, the commission must ensure that any application for a CAFO permit comply with the applicable requirements of Chapter 307, as well as other relevant TCEQ rules, including 30 TAC § 321, Subchapter B, which requires the Commission to ensure there will be no discharge or disposal of manure, litter or wastewater from a CAFO into or adjacent to waters in the state, except in accordance with authorization issued by the Commission. The concerns of Mr. McCoy and the Coalition about the potential impact of the Dairy's operation to his family and property are issues protected by the law under which the application will be considered. We believe Mr. McCoy and the Coalition have demonstrated the existence of a reasonable relationship between its interests and the regulated activity. OPIC therefore finds that Mr. McCoy has demonstrated that he qualifies as an affected person in his own right and that the requirements for associational standing have been met by the Coalition..

The Coalition has identified at least one member of the group who would individually qualify as an affected person. In addition the Coalition has provided information that its interest in protecting the water quality in the Bosque River Watershed is germane to the purpose of the organization. We agree that neither the claim asserted nor the relief requested requires the participation of Mr. McCoy in the case.²

We note that Mr. McCoy's property is located .92 miles from the Wyly Dairy property and approximately 2.12 river miles from the facility and anticipate that other parties responding to the Coalition's request will give great weight to this factor in their recommendation. However, Mr. McCoy has shown that he has a personal justiciable interest not common to members of the general public; the distance should not of itself be determinative of the validity of his affected interests. Based on the reasons given by the requester, the applicable law and the fact that the dairy is increasing to 2,950 head from what was a 950 head operation, we recommend that the commission find the Coalition to be an affected person.

¹ Texas Water Code § 26.003.

² 30 TAC § 55.205(a),

C. Issues Raised in the Hearing Request

The Coalition has raised the following issues:

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).

D. Whether the disputed issues involve questions of fact or of law

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. OPIC concludes that each of these issues involves a question of fact and is disputed. *See* 30 TAC §55.211(b)(3)(A) and (B).

E. Whether the issues were raised during the public comment period

All of the above listed issues were raised by the City of Waco during the public comment period.

F. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn

This hearing request relies on and is based on issues raised solely in a public comment which has not been withdrawn.

G. Whether the issues are relevant and material to the decision on the application

In order to refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit.³ Relevant and material issues are those that are governed by the substantive law under which this permit is to be issued.

³ *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-251(1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated "[a]s to materiality, the substantive law will identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.")

The TCEQ is responsible for the protection of surface water quality under Chapter 26 of the Texas Water Code.⁴ In addition, any application for a CAFO permit must comply with Chapter 307, as well as other relevant TCEQ rules, including 30 TAC § 321, Subchapter B, which requires the Commission to ensure there will be no discharge or disposal of manure, litter or wastewater from a CAFO into or adjacent to waters in the state, except in accordance with authorization issued by the Commission. Thus, the Coalition's issues which relate to the regulation and management of these types of wastes are relevant and material.

The Coalition also raises concerns with the design, regulation and management of Retention Control Structures (RCS). 30 TAC § 321.42(c) addresses requirements for the proper operation and management of RCSs. Consequently, these issues are relevant and material to the Commission's decision on this application.

The Coalition has also raised issues regarding nutrients discharged from the site and the applicant's plans to properly manage nutrients associated with the site. TCEQ rules state there must be a site-specific nutrient management plan (NMP) for all CAFOs.⁵ Further, nutrients are regulated under the Texas Surface Water Quality Standards⁶ and have the potential to adversely impact Texas water quality generally. Therefore, all the Coalition's issues relating to the applicant's management and discharge of nutrients, on and off-site, are relevant and material.

The Coalition further raised issues related to the land application of wastes generated by the facility. Under the applicable rules, the applicant must, at a minimum, comply with TCEQ regulations governing the land application of manure, litter, or wastewater.⁷ In addition, application of these types of waste to land owned by third parties must be conducted in compliance with agency rules governing third party land application.⁸

Each issue in the Coalition's request for hearing raises specific questions about the draft permit itself and whether the permit is adequately protective of surface water quality in the North

⁴ See Texas Water Code § 26.003.

⁵ 30 TAC § 321.36(d), and 30 TAC § 321.40(k).

⁶ 30 TAC, Chapter 307.

⁷ 30 TAC § 321.40.

⁸ 30 TAC § 321.42(j).

Bosque River and the Bosque River Watershed. Protection of surface water quality is the purpose of the draft permit and therefore each issue is relevant and material.

H. Issues Recommended for Referral

OPIC recommends that the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

1. Whether retention control structures ("RCSs") will be adequately designed, regulated, managed and certified to protect water quality under the Draft Permit.
2. Whether Draft Permit provisions for the storage of slurry from freestall barns will negatively impact water quality.
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.
4. Whether settling basins are properly designed, regulated, and certified to protect water quality.
5. Whether settling basin solids are properly characterized and regulated to protect water quality under the Draft Permit.
6. Whether capacity certification and requirements for RCSs are properly described and established in the Draft Permit to ensure water quality is protected.
7. Whether the RCS liner sampling and embankment testing required under the Draft Permit are adequately protective of water quality.
8. Whether RCS construction soil qualities are appropriately articulated in the Draft Permit to ensure adequate protection of water quality.
9. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit.
10. Whether an adequate description of structural controls exists in the Draft Permit.
11. Whether the Applicant has demonstrated adequate dewatering capacity.
12. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected.
13. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality.

14. Whether the Draft Permit properly manages phosphorus production.
15. Whether removal of solid manure under the Draft Permit is adequate to meet water quality requirements for the North Bosque watershed.
16. Whether land management units ("LMUs") are properly sized.
17. Whether the Applicant's projected crop yields for its LMUs and third party fields are reasonable.
18. Whether the NMP adequately identifies soil test locations and timing.
19. Whether the NMP includes an application rate that will be adequately protective of water quality.
20. Whether agronomic rates are properly calculated in the NMP.
21. Whether the Draft Permit sufficiently restricts the application of phosphorus to be adequately protective of water quality.
22. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water.
23. Whether the Draft Permit provisions regarding use of third party fields are adequate to protect water quality.
24. Whether manure and wastewater application on third party fields will be properly managed and regulated to prevent degradation of water quality.
25. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year.
26. Whether the historical waste application fields should be identified in the application or the Draft Permit.
27. Whether the Draft Permit provides meaningful definition of vegetative buffers.
28. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards.
29. Whether the Draft Permit establishes adequate reporting requirements for third party fields.
30. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields.

31. Whether the Draft Permit is sufficiently protective of environmental health as to prevent further degradation of water quality in receiving streams.
32. Whether the Draft Permit will authorize activities that may adversely affect the health and well being of Coalition members, including the McCoy family.

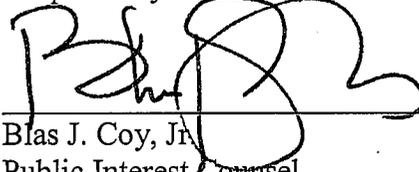
I. Maximum expected duration for the contested case hearing

For the contested case hearing, OPIC estimates a maximum duration of 9 months from the first day of the preliminary hearing to issuance of the proposal for decision.

III. CONCLUSION

We conclude that the Coalition is an affected person and recommend the Commission grant its hearing request. This matter should be referred to SOAH for an evidentiary hearing on the issues set out above. OPIC further recommends a hearing duration of 9 months.

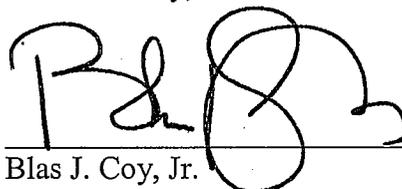
Respectfully submitted,



Blas J. Coy, Jr.
Public Interest Counsel
State Bar No. 04965820
P.O. Box 13087, MC 103
Austin, Texas 78711
Telephone: (512) 239-6363
Fax: (512) 239-6377

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2009, the original and seven true and correct copies of the foregoing document were filed with the TCEQ Chief Clerk, and copies were served to all parties listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, or by deposit in the U.S. Mail.



Blas J. Coy, Jr.

MAILING LIST
RANDY EARL WYLY
TCEQ DOCKET NO. 2009-1245-AGR

FOR THE APPLICANT:

Randy Wyly
Randy Wyly Dairy 2
3502 CR 209
Hico, Texas 76457- 3530
Tel: (254) 968-7101
Fax: (254) 968-5887

Norman Mullin
Enviro-Ag Engineering, Inc.
3404 Airway Blvd.
Amarillo, Texas 79118-7741
Tel: (806) 353-6123
Fax: (806) 353-4132

FOR THE EXECUTIVE DIRECTOR:

Bob Brush, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE

RESOLUTION:

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTER:

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