

10/9/09 10:55 AM 35 J. Kalisek

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October 9, 2009

Ms. LaDonna Castañuela  
Texas Commission on Environmental Quality  
Office of Chief Clerk, MC-105  
Bldg. F, 3<sup>rd</sup> Floor  
Austin, Texas 78711-3087

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2009 OCT -9 PM 3:5  
CHIEF CLERKS OFFICE  
**VIA HAND DELIVERY**

Re: In the Matter of the Application by Randy Earl Wyly No. 2  
for Permit No. WQ0003190000  
TCEQ Docket No. 2009-1245-AGR

Dear Ms. Castañuela:

Enclosed for filing please find the original and eight (8) copies of Requestor's Reply to Response to Hearing Request in the above-referenced matter. Please file stamp the extra copy and return it to me via my messenger.

If you have any questions, please do not hesitate to contact me at (512) 322-5847.

Sincerely,  
  
Lauren Kalisek

LJK/ldp  
2402\04\W2\ltr091009mcr  
ENCLOSURES

cc: Service List

TCEQ DOCKET NO. 2009-1245-AGR

APPLICATION BY  
RANDY EARL WYLY/ WYLY DAIRY  
NO. 2 FOR TPEDS PERMIT NO.  
PERMIT NO. WQ0003190000

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BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

2009 OCT -7 PM 3: 55  
CHIEF CLERKS OFFICE

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

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REQUESTOR'S REPLY TO RESPONSE TO HEARING REQUEST

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TO THE HONORABLE COMMISSIONERS:

COMES NOW, the Bosque River Coalition, (the "Coalition"), and files this Reply to the Executive Director's Response to Hearing Request with the Texas Commission on Environmental Quality (the "Commission") in the above-referenced matter. The Commission should grant the Coalition's hearing request because (1) a member of the Coalition, Mr. D.L. McCoy, qualifies as an "affected person" in his own right; (2) all issues identified by the Coalition are relevant and material disputed issues of fact raised during the comment period that have not been withdrawn; (3) the request was timely filed with the Chief Clerk; (4) the Coalition's request is made pursuant to a right to hearing authorized by law; and (5) the request otherwise complies with the provisions of Section 55.201(d) of the Commission's rules.<sup>1</sup>

The Executive Director ("ED") contends that the Commission should not grant the Coalition's hearing request because Mr. McCoy is not an affected person due to the ED's conclusion that Mr. McCoy does not have a personal justiciable interest distinguishable from that of the general public. The ED bases this conclusion on two arguments: (i) the allegation that Mr. McCoy is not likely to be impacted because the Permit does not authorize discharges into water in the State under normal operating conditions; and (ii) the allegation that activities at the

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<sup>1</sup> 30 Tex. Admin. Code § § 55.115(c); 55.201(c)(d); 55.203; and 55.205(a). References to the Commission's rules herein are generally to Title 30, Texas Administrative Code Chapter 55 unless otherwise noted.

Facility are not expected to affect the health and safety of Mr. McCoy due to the distance of his property from the Facility. Both of these grounds are legally and factually flawed as discussed in detail herein. Additionally, the ED recommends against referring the vast majority of the issues identified in the Coalition's hearing request because it asserts such issues are matters of law or not relevant and material to the decision on the application. The ED argues that the issues merely challenge the Commission's interpretation of CAFO rules. However, the issues identified in the hearing request do not challenge the agency's interpretation of its rules so much as pose the question as to whether additional permit conditions *not inconsistent with* the agency's rules would provide better protection for human health and safety and the environment. The ED's position that it does not want to do more than the bare minimum than is required by the agency's rules in drafting CAFO permits for facilities in this impaired watershed is certainly a position that should be subjected to the contested case hearing process.

## I. INTRODUCTION

Randy Earl Wyly/Wyly Dairy No. 2 (the "Wyly Dairy" or "Applicant") applied to the TCEQ on November 27, 2006 for a major amendment of Texas Pollutant Discharge Elimination System ("TPDES") Permit No. WQ0003190000 (the "Permit") for a Concentrated Animal Feeding Operation ("CAFO"). The major amendment will authorize the Applicant to expand its existing dairy facility (the "Facility") from 950 head to a maximum capacity of 2,950 head.

The draft permit prepared by the ED ("Permit") authorizes discharges of wastewater to waters in the State from retention control structures ("RCS") to be constructed at the Facility whenever chronic or catastrophic rainfall events or catastrophic conditions cause an overflow of such structures.<sup>2</sup> The Permit also authorizes precipitation-related runoff from land management

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<sup>2</sup> Permit, VII.A.2.(a).

units (“LMUs”) at the Facility where wastewater, sludge and manure is applied if such application is in accordance with Permit conditions.<sup>3</sup> The Permit otherwise prohibits the drainage of wastewater, sludge or manure from an LMU.<sup>4</sup> Finally, the Permit authorizes the disposal of wastewater, sludge and manure generated at the Facility to operators of third-party fields not owned, controlled, rented or leased by the Applicant subject to specific agronomic rates of application and soil sampling requirements and subjects the permittee to enforcement if such provisions regarding third-party fields are not met.<sup>5</sup>

On August 3, 2009, the Coalition filed a timely request for hearing regarding the Permit identifying Mr. McCoy as a Coalition member likely impacted by the regulated activities at the Facility given that he owns property abutting an unnamed tributary of Duffau Creek that is approximately 2 miles downstream of the Facility. The ED provided its Response to Hearing Request on September 25, 2009 (“ED Response”) and recommended the Coalition's hearing request be denied. The Office of Public Interest Counsel (“OPIC”) filed its Response to Request for Hearing on September 25, 2009 (“OPIC Response”) and recommended that the hearing request be granted.

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

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<sup>3</sup> Permit VII.A.8(f)(2)(ii).

<sup>4</sup> Permit VII.A.(f)(2)(i).

<sup>5</sup> Permit VII.A.8(e)(5)(i)(A)-(H),(ii), and (iii).

## **II. REPLY TO EXECUTIVE DIRECTOR'S RESPONSE**

### **A. General Hearing Request Requirements**

In compliance with Section 55.201(c) and (d) of the Commission's rules, the Coalition filed a timely hearing request in writing that was based upon issues raised in public comments during the public comment period that were not later withdrawn and included relevant contact information. Both the ED and OPIC agree that the Coalition's hearing request substantially complies with these requirements.<sup>6</sup>

### **B. Requirements of Request by Group or Association**

The Coalition also has complied with the requirements of Section 55.203 and 55.205(a) by (i) identifying a member of the Coalition, Mr. McCoy, who has standing in his own right to request a hearing; (ii) by showing that the interests the Coalition seeks to protect are germane to its purpose; and by (iii) showing that neither the claim asserted nor the relief requested requires the participation of individual members in this case. Both OPIC and the ED agree that the Coalition has met these requirements with the exception that the ED does not believe that Mr. McCoy is an affected person based on its conclusion that Mr. McCoy does not have a personal justiciable interest that is not common to members of the general public. The ED comes to this conclusion based on two arguments: (1) its assertion that the Permit does not authorize a discharge under normal operating conditions; and (2) its assertion that the distance between the Facility and Mr. McCoy's property makes it unlikely that he, or his use of his property or the abutting creek, will be impacted by activities from the Facility.

These positions are not only contrary to the legislative intent and public policy concerns leading to the requirement for individual permits in the Bosque River Watershed, but they ignore

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<sup>6</sup> ED Response, p.4; OPIC Response, pgs. 4-5.

the factual assertions contained in the Coalition's hearing request that Mr. McCoy *has already been impacted by poor water quality in the creek*. Most importantly, these positions are based on an incorrect legal analysis of the activities at the Facility that are regulated by the Permit that are likely to impact Mr. McCoy. Each of these flaws is addressed herein.

**1. Public Involvement in Environmental Permitting**

During the 76<sup>th</sup> Legislative Session, House Bill 801 ("HB 801") was enacted to modify the permitting process for certain environmental permit programs administered by the Commission for which public notice and opportunity for hearing were required.<sup>7</sup> The purpose of HB 801 was to allow and encourage public involvement in the permitting process by requiring early public notice, substantive public comment, and agency response.<sup>8</sup> HB 801 enacted, in part, Subchapter M. Environmental Permitting Procedures, Sections 5.551-5.558 of the Texas Water Code.<sup>9</sup> In accordance with HB 801, the Commission promulgated rules under Chapter 55 of Title 30, Texas Administrative Code to further clarify public involvement in environmental permitting.<sup>10</sup>

**2. Legislative Intent to Protect the North Bosque River Watershed**

In 2001, the 77<sup>th</sup> Texas Legislature passed HB 2912, based upon its heightened concern associated with the impacts of dairies on the North Bosque River watershed. HB 2912 sought to protect the North Bosque River watershed from adverse environmental impacts associated with dairy activities by creating a major sole source impairment zone ("MSSIZ") for this watershed.<sup>11</sup> The very purpose and effect of a MSSIZ is to reduce pollution in those areas and waterways that

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<sup>7</sup> 24 Tex. Reg. 9039 (October 15, 1999).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See TEX. WATER CODE § § 26.501-504 (Vernon 2008).

are particularly vulnerable to degradation from dairy activities.<sup>12</sup> Inherent in HB 2912 is the principle that if more stringent requirements for a dairy CAFO were implemented, improved water quality for the North Bosque River should result.<sup>13</sup> Consistent with the concerns associated with such an impairment zone, a CAFO permit application for a facility located within the MSSIZ is subject to specific heightened protections.<sup>14</sup> One of the protections is the requirement for individual permitting.<sup>15</sup> This requirement presents a substantial departure from practices in effect before the legislation was enacted.

Prior to HB 2912, it was acceptable for a CAFO within the North Bosque River watershed to secure authorization for its regulated activities through a general permit. After passage of HB 2912, TCEQ was no longer authorized to issue a general permit to any dairy CAFO within a MSSIZ.<sup>16</sup> By this legislation, the Legislature, in clear and precise language, required that all permits in the North Bosque River watershed be processed as individual permit applications. Inherent in that change is the concept that CAFO permits, such as the Applicant's, are subject to contested case hearing proceedings. Obviously, the Legislature intended to allow "affected persons" to contest CAFO permit applications within a MSSIZ. Under the ED's interpretation of the applicable law, however, there is not a single person or entity that is entitled to standing in a contested case hearing on a CAFO permit, regardless of whether the permit is a general permit or an individual permit. The ED's position—that because the Permit does not authorize discharges under normal operating conditions, people located a few miles downstream cannot possibly be affected—is completely contrary to the legislative intent in enacting HB

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<sup>12</sup> *Id.*

<sup>13</sup> 29 Tex. Reg. 6664 (July 9, 2004).

<sup>14</sup> *See, generally* TEX. WATER CODE §§ 26.501-504 (Vernon 2008).

<sup>15</sup> *Id.* at § 26.503(a).

<sup>16</sup> *Id.*

2912. In fact, the ED's position completely undermines the Legislature's intent in passing both HB 801 and HB 2912 by not only effectively preventing affected persons from participating in a contested case hearing for a CAFO permit, but also by failing to adequately protect the North Bosque River watershed.

### **3. Previous Impacts to Mr. McCoy**

Apparently, under the ED's argument, Mr. McCoy, a landowner downstream of this Facility and one who has already been impacted by degraded water quality in the stream abutting his property, is supposed to just assume that the Permit, as drafted by the ED, will ensure that an increase at this facility by 2,000 head will not have a likely impact on him or his use of his property and the tributary of Duffau Creek abutting his property. Additionally, Mr. McCoy is supposed to make this assumption despite the history of poor water quality he has already experienced that has certainly impacted his use of his property and the creek as described in the Coalition's hearing request:

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.<sup>17</sup>

This description of impacts to Mr. McCoy, his use of his property, and his use of the creek goes directly to the factors to be considered by the Commission in determining affected person status: the likely impact of the regulated activity on the health and safety of the person

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<sup>17</sup> Coalition Hearing Request, p. 2.

and on the use of the property of the person, and the likely impact of the regulated activity on the use of the impacted natural resource by the person.<sup>18</sup> Mr. McCoy has already been impacted by poor water quality in the creek, and the activities regulated at the Facility by the permit have the potential to likely impact him, especially given the proposed expansion.

#### **4. Activities Regulated by Permit Are Likely to Impact Mr. McCoy**

The ED attempts to circumvent the obvious likely impacts to Mr. McCoy by arguing that the Permit does not authorize discharges under normal operating conditions—only during 10-day, 25-year storm events. However, this description of the Permit’s authorization is misleading because it leaves out other fundamental activities at the Facility that are regulated by the Permit that can impact Mr. McCoy. These activities include the storage and stockpiling of sludge and manure and the application of sludge, manure and wastewater to LMUs and third-party fields. As described in Section I above, the Permit is much more than simply an authorization for discharges from RCSs under extreme rain events—it authorizes precipitation-related runoff from LMUs under certain conditions; prohibits the drainage of wastewater, sludge or manure from an LMU; and authorizes the disposal of wastewater, sludge and manure generated at the Facility to operators of third-party fields. It is not just the extreme storm events that have the potential to impact Mr. McCoy. All of these activities that will be part of the normal operations of the Facility can lead to the release of nutrient-laden pollution into the creek that will impact his use of the creek and his adjoining property.

It is also important to recall that discharges from this Facility into this tributary of Duffau Creek occur upstream of Mr. McCoy’s property and will eventually flow into the North Bosque River, a segment that is impaired and subject to a total maximum daily load (“TMDL”) for the very pollutant that is principally regulated by the Permit and which has already impacted the

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<sup>18</sup> 30 Tex. Admin. Code § 55.203(c)(4) and (5).

creek. Although the Permit may not authorize discharges from the RCSs “under normal operating conditions,” it still allows discharges under significant storm events that will allow tremendous loadings of pollutants to be discharged downstream, thereby impacting Mr. McCoy. In addition, the Permit does not require the Applicant to identify third-party fields that may be used for receiving and applying wastewater, sludge and manure from the Facility. These fields are not identified in either the application or the Permit but yet are authorized to be used for waste disposal, so fields could be located less than a mile upstream of Mr. McCoy’s property. Without knowing the location of these third-party fields, the Commission should err on the side of caution and recognize Mr. McCoy’s affected person status given the additional impact discharges or runoff from third-party fields could have.

The ED’s argument that Mr. McCoy is not an affected person because there will be no impact to his property as “no discharge” is authorized under the Permit for the Facility under normal operating conditions, if taken at face value, would never confer affected person status on a requestor on the basis of impacts due to possible discharge, no matter if they were 1 mile, 2 miles or 2 feet from a regulated facility. This argument is akin to saying that a requestor would not constitute an affected person for a contested case hearing on a TPDES permit application for a Publicly Owned Treatment Works (“POTW”) because the TPDES permit does not allow the exceedance of its effluent limits. The existence of the Permit makes *no guarantee* that no discharge will occur simply because the Permit prevents such discharge—and yet the ED asserts precisely this in its response. The ED’s assertion raises the question—why is a notice authorizing the opportunity to request a hearing ever issued on any CAFO-related or TLAP-related disposal permit if persons filing hearing requests seemingly cannot be “affected” because

there will be no authorized discharges from regulated facilities “under normal operating conditions?”

The ED attempts to support this argument by suggesting that even under conditions when the RCSs at the Facility would be allowed to discharge, in the event of a 25-year, 10-day storm event, such a discharge “may not occur” because this amount of rainfall is “very infrequent” in the area of the Facility, and because RCSs are created to contain such rainfall events. This argument is flawed for several reasons. First, as discussed above, releases from RCSs are not the only operations at the Facility likely to impact Mr. McCoy. Second, the notion that the Applicant's RCSs are designed, constructed, operated, and maintained so as to contain a discharge from all rainfall events, up to and including the 25-year, 10-day storm event, is a critical disputed *issue of fact*. Third, when storms exceeding the 25-year, 10-day event do occur, tremendous loadings of phosphorus will be discharged from the Facility, harming downstream properties, including Mr. McCoy's property. This, too, is an *issue of fact*. Such *issues of fact* are properly determined in the course of a contested case hearing, not assumptions to be made by the Commission as rational for denying affected person status.

#### **5. ED's Distance Analysis**

The second basis for the ED's conclusion that Mr. McCoy is not an affected person is its position that the distance from the Facility to Mr. McCoy's property is such that it is unlikely he will be impacted. Although the ED notes that its own mapping indicates that such distance is 1.8 miles between the Facility and Mr. McCoy's property along the creek, it argues that this distance is not relevant because it is measured from the closest LMU rather than an RCS, and it is the location of the RCS that should govern the distance analysis. The ED then argues that a

discharge from one of the RCSs at the facility would have to travel overland possibly over a mile to reach the creek.

The ED makes this distinction between LMUs and RCSs based on the flawed legal analysis that only discharges from RCSs are regulated by the Permit and that runoff from LMUs where the waste is applied in conformance with the Permit is “exempt from regulation under 33 USC 1362(14).”<sup>19</sup> However, this argument fails to recognize the very provisions of the Permit the ED has drafted and discussed in Section I regarding the regulation of waste application to LMUs and third-party fields. This argument also ignores the Commission’s own statutory authority to regulate the application of waste and discharge of pollutants under State law that clearly includes runoff from LMUs and confinement areas from CAFOs located in a MSSIZ, such as this Facility.<sup>20</sup> Under applicable State law, CAFOs in a MSSIZ must obtain a permit authorizing the discharge of agricultural waste (which is defined to include not only discharges from RCSs, but also specifically runoff from LMUs and CAFO confinement areas in a MSSIZ) into or adjacent to any water in the state.<sup>21</sup> Therefore, impacts from runoff from LMUs are an appropriate basis of affected person analysis.

Furthermore, although regulations note that a person's distance to a regulated activity is a factor in determining status as an affected person, no exact distance restriction exists.<sup>22</sup> Although it may be TCEQ's policy to take a closer look at a hearing request when the alleged person affected is beyond one mile downstream, a broader approach should be taken in this instance given the North Bosque River's impaired status for the very pollutants that are regulated by the Permit and that may be discharged from the Facility.

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<sup>19</sup> ED Response, p. 6.

<sup>20</sup> TEX. WATER CODE ANN. §26.001 (6)(10) and (13) (Vernon 2008).

<sup>21</sup> TEX. WATER CODE ANN. §26.121(a)(1) (Vernon 2008).

<sup>22</sup> See 30 Texas Admin. Code § 55.203(c); see also OPIC Response, p. 5.

This broader approach is appropriate for a couple of reasons. First, if a discharge from the Facility's RCSs were to occur from storm events meeting or exceeding the 25-year, 10-day storm event, it is likely that tremendous loadings of pollutants would discharge downstream, thereby impacting Mr. McCoy's property.<sup>23</sup> Second, this broader approach is particularly appropriate given the Permit's lack of a requirement that the Applicant identify third-party fields receiving and applying wastewater, sludge and manure from the Facility. These fields are not identified in either the application or the Permit but yet are authorized to be used for waste disposal, so fields could be located less than a mile upstream of Mr. McCoy's property. As discussed previously, without knowing where these third-party fields are, the Commission should err on the side of caution and grant Mr. McCoy affected person status given the additional impact discharges or runoff from third-party fields could have.

### **C. Disputed Issues Raised in the Request for Hearing**

In order to support a request for hearing, all relevant and material disputed issues of fact raised during the public comment period upon which the requestor bases the request for hearing must be provided.<sup>24</sup> In accordance with Sections 55.201(d)(4) and 55.115(c) of the Commission's rules, the Coalition based its hearing request on the following issues that (1) are disputed questions of fact; (2) were raised during the public comment period; and (3) are relevant and material to the decision on the application:

1. Whether retention control structures ("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).

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<sup>23</sup> As noted above, the ED's argument that such discharges may not even reach the creek due to the distance of the RCSs from the creek is an issue of fact that is properly addressed in hearing rather than a factual assumption that should be made during affected person analysis.

<sup>24</sup> 30 Tex. Admin. Code § 55.201(d)(4).

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).

In its response, the ED complains that the disputed issues of fact asserted by the Coalition are “overbroad to the extent that they bring in issues not raised during the comment period.”<sup>25</sup> The issues set forth by the Coalition are exactly what the Coalition portends—disputed issues of fact that arose during the comment period. There is no requirement under TCEQ rules that the disputed issues of fact be *verbatim* the comments raised during the comment period. In its framing of the issues, the Coalition sought to consolidate numerous comments that were timely made and which form the basis of the Coalition's hearing requests. The issues raised by the Coalition in its hearing request represent the essence of the comments made during the comment period, and they reference the applicable comment upon which each issue is based. The ED's categorization of these issues as “overbroad” appears to be more of an attempt by the ED to avoid addressing these disputed issues of fact directly so that it can merely regurgitate the precise responses included in the ED's Response to Comments. Consequently, the ED Response *fails* to comply with the content requirements for a response to a hearing request under Section 55.209(e) because it does not address the specific issues raised in the Coalition's hearing request.

Even if the allegations of the ED were correct, the ED's argument for referring only five out of the 32 issues listed in the Coalition's hearing request is completely unfounded and legally incorrect. The ED asserts that issues # 6-41, as the Coalition's 32 issues were reframed by the ED, are either (1) not relevant and material to a decision on the application or (2) concern a matter of law, not a disputed issue of fact. The ED complains that the Coalition is merely attempting to challenge the ED's interpretation of the CAFO rules or promote imposition of

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<sup>25</sup> ED Response, p. 7.

more stringent rules through the contested case hearing process. Despite these arguments, however, the Coalition's issues are relevant and material and involve disputed issues of fact. That some of the original comments on which the issues identified in the hearing request are based questioned the need for permit conditions that are *not inconsistent* with the CAFO rules to provide better protection and tighter permit provisions is not a valid reason to discount the issues raised by such comments.

### **1. Relevant and Material Issues**

Each of the issues set forth in the Coalition's hearing request is clearly relevant and material to the decision on the application by addressing whether specific requirements and conditions of the Permit will adequately protect affected persons like Mr. McCoy and the Bosque River watershed from illegal discharges or runoff from the Facility. As noted in the OPIC Response, “[r]elevant and material issues are those that are governed by the substantive law under which this Permit is to be issued.”<sup>26</sup> The issues cited by the Coalition, and even the issues as improperly reframed by the ED, all constitute relevant and material issues because they are governed by the law established to protect the water quality of the North Bosque River watershed—Chapter 26 of the Texas Water Code, and Chapters 307 and 321 of Title 30, Texas Administrative Code.

For example, in the ED's Response, reframed issue #7 is “[w]hether the Applicant should be required to produce an RCS Management Plan prior to the permit being issued.”<sup>27</sup> The ED responds to its reframed issue by indicating that “TCEQ rules do not require review of RCS management plans prior to issuing the permit....Therefore, the fact that the Applicant has not produced an RCS management plan prior to permit issuance is not relevant and material to a

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<sup>26</sup> OPIC Response, p. 8 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986)).

<sup>27</sup> ED Response, p. 8.

decision on the application.”<sup>28</sup> The ED's response to reframed issue #7 does not make sense. RCSs represent the very infrastructure that the ED alleges in its Response will contain any possible discharge during a 25-year, 10-day storm event, and yet the ED does not believe that this issue is relevant and material? The issue essentially addresses whether the Permit is adequately protective of water quality without prior TCEQ review of the RCS management plan. There is no way to determine that such an issue is not relevant and material to a decision on the application—particularly given the ED's position as to the use of RCSs to control discharges during 25-year, 10-day storm events.

As a second example, the ED's reframed issue #23 is “[w]hether the draft permit properly accounts for the management of phosphorus production in compliance with the CAFO rules.”<sup>29</sup> In response, the ED states that “as long as the phosphorus being land applied or hauled-out is accounted for as required under TCEQ rules, an accounting to reflect what remains in the CAFO production area is not necessary...Therefore, [this issue] is not relevant and material to a decision on the application.”<sup>30</sup> The Permit authorizes the Applicant to operate with 2,950 cows that will produce 290,175 pounds per year (“lbs/yr”) of phosphorus, of which only 4,578 lbs/yr will be applied to LMUs or to unidentified third-party fields. This leaves a remainder of 285,597 lbs/yr of phosphorus that is unaccounted for at the Facility. The Facility is located in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River basin. Segment No. 1226 currently has a TMDL for phosphorus that seeks to reduce levels of phosphorus in the stream segment.<sup>31</sup> This TMDL even identifies CAFOs as point source dischargers—and in the case of

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<sup>28</sup> *Id.* at p. 9.

<sup>29</sup> *Id.* at p. 13.

<sup>30</sup> *Id.* at p. 13.

<sup>31</sup> See TCEQ, *Two Total Maximum Daily Loads for Phosphorus in the North Bosque River for Segments 1226 and 1255*, February 2001.

the Facility, it is a point source discharger of up to 290,175 lbs/yr of phosphorus. An issue is relevant and material to a decision on the Permit if it is governed by the substantive law under which the Permit is to be issued. TMDLs are required under Section 303(d) of the Clean Water Act, and TCEQ is required to consider and comply with Section 303(d) in making its decision on the Permit—thereby establishing both the relevancy and materiality of the issue.

## 2. Disputed Issues of Fact

The ED also asserts that the issues raised by the Coalition in its hearing request, but reformed by the ED in its response, are a “matter of law” and should not be referred to SOAH because no legal requirement exists regarding the specific disputed issue. Not surprisingly, in the ED's focus on the details, the ED failed to acknowledge the legal requirement at the heart of each of the Coalition's proposed disputed issues of fact—the requirement that “[e]ach permit shall contain terms and conditions...necessary to protect human health and safety, and the environment.”<sup>32</sup>

The mere fact that an issue raised is over a concern with the Facility not specifically addressed in TCEQ's regulations does not automatically transform a disputed issue of fact into a “matter of law.” Texas courts have addressed the difference between that which constitutes a disputed issue of fact and that which constitutes a matter of law.<sup>33</sup> An issue of fact will only be established as a matter of law if the issue is undisputed and reasonable minds could not differ as to the conclusion of the issue.<sup>34</sup> The ED's response to, or more appropriately dispute of, the public comments made by the City of Waco and the Coalition's hearing request is evidence that

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<sup>32</sup> 30 Tex. Admin. Code § 321.36(b).

<sup>33</sup> See *Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994); see also *Coldwell Bank Whiteside Assocs. v. Ryan Equity Partners, Ltd.*, 181 S.W.3d 879 (Tex. App.—Dallas 2006, no pet.).

<sup>34</sup> *Lehman v. Wieghat*, 917 S.W.2d 379, 382 (Tex. App.—Houston[14 Dist.] 1996, writ denied) (citing *Southwest Wheel & Mfg. Co. v. Sholts*, 501 S.W.2d 387 (Tex. App.—Beaumont 1973, writ ref'd n.r.e.)).

these issues are in dispute, and further, that reasonable minds—the ED's versus the Coalition's—can differ. OPIC's recommendation to refer all the issues in the Coalition's hearing request is further support that these issues constitute disputed issues of fact upon which reasonable minds differ.

As an example, the ED's reframed issue #9 is “[w]hether the method of calculating the sludge accumulation rate from open lot runoff in the permit application is in compliance with CAFO rules in 30 TAC Chapter 321.”<sup>35</sup> The ED simply responds that “[a]s a matter of law, the ED accepts the methodology used by the Applicant for estimating the sludge accumulation rate for runoff from open lot areas.”<sup>36</sup> The Applicant calculated the sludge accumulation volume resulting from runoff based on 25 percent of the runoff from the 25-year, 10-day rainfall event, but it has provided no technical justification or historical support for this value. The Coalition disputes, given the lack of any support, whether this value is acceptable; whereas the ED claims that the Applicant used an acceptable method to determine this value. The reframed issue #9 is a textbook example of a disputed issue of fact. Just because the method utilized by the Applicant may, arguably, constitute an acceptable method in Texas does not automatically make this value acceptable in a way to adequately protect water quality in the Bosque River watershed. The fact issue of whether the value for open lot runoff for calculating sludge accumulation volume is acceptable in this instance is disputed by both the Coalition and the ED; therefore, this issue should be referred to SOAH.

Another example is in the ED's reframed issue #38, which is “[w]hether the draft permit meets the applicable regulatory requirements in 30 TAC Chapter 321 for controlling runoff

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<sup>35</sup> ED Response p. 10.

<sup>36</sup> *Id.*

potentially caused by bacteria and other pathogens.”<sup>37</sup> The ED indicates that best management practices (“BMPs”) may be used for controlling bacteria and that “[a]s a matter of law, there are no further requirements to impose additional BMPs not already in place or that would be required if the draft permit is issued, to specifically address bacteria separately from nutrients.”<sup>38</sup> This response does not even directly address the issue raised in the Coalition’s hearing request as to whether water quality in the Bosque River watershed will be protected by the Permit. The ED merely argues that BMPs may be used to limit the amount of bacteria—not that BMPs used by the Facility will limit the amount of bacteria and protect water quality, just that the Facility has a mechanism for doing so. The Coalition disputes whether water quality will be adequately protected from bacteria and other pathogens under the Permit pursuant to TCEQ regulations. The ED disputes this issue by presuming that the simple existence of current BMPs, and not actual application of same, will protect water quality. As such, this issue constitutes a disputed issue of fact regarding adequate protection of water quality. The lack of a specific regulation for additional BMPs does not convert this issue into a matter of law.

An analogy may be helpful to better explain the flawed nature of the ED's argument. A hearing requestor concerned about a toxic metal's effects possibly contained in the discharge of a POTW upstream of his property could ask the Commission to consider the imposition of a specific limit for the metal even though the Texas Surface Water Quality Standards and the Commission's implementation procedures would not normally require the application of such a limit based on the given circumstances of the discharge. Does the hearing requestor's request for a limit that may not be specifically required under the TCEQ rules and policies negate the requestor's underlying comment and interest in protecting water quality so as to render the

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<sup>37</sup> ED Response p. 17.

<sup>38</sup> *Id.*

underlying issue as not referable as a matter of law? Clearly, in this example, the requestor is raising an issue that is within the scope of the Commission's jurisdiction to consider. That the requestor's proposed solution, the imposition of a specific limit, may not be specifically required under the rules and policies of the agency at this time is an argument to be made by the ED during the hearing, not a reason to deny the hearing request.

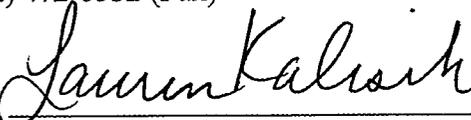
Whether specifically set forth in TCEQ regulations or not, the issues set forth by the Coalition are disputed issues of fact that are relevant and material to the determination of the Facility's application. Therefore, all of the foregoing issues as set forth by the Coalition are appropriate for referral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

### III. CONCLUSION

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

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**CERTIFICATE OF SERVICE**

I hereby certify that on this the 9<sup>th</sup> day of October, 2009, a true and correct copy of the foregoing was sent via first-class mail, electronic mail, facsimile, or hand-delivery to the following persons:

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