

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

October 26, 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: **TWO SISTERS DAIRY, LLC**
TCEQ DOCKET NO. 2009-1606-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 cursive script that reads "Amy Swanholm".

Amy Swanholm, Attorney
Assistant 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

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TCEQ DOCKET NO. 2009-1606-AGR

**IN THE MATTER OF
THE APPLICATION OF
TWO SISTERS DAIRY,
LLC GERBEN FOR
TPDES PERMIT NO.
WQ0004866000**

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**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

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

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, the Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (the Commission or TCEQ) with a Response to Requests for Hearing in the above-referenced matter.

I. INTRODUCTION

A. Background of Facility

Two Sisters Dairy, LLC (Two Sisters) has applied for a for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004866000 (EPA ID No. TX0128872) for a Concentrated Animal Feeding Operation (CAFO). The draft permit would authorize the Two Sisters to operate facility with 5,500 total head of cattle, and 4,000 head of which would be milking cows. The proposed permit would authorize land application of wastewater, sludge, slurry and manure on 220 acres of land. Discharges to surface water would be allowed when chronic or catastrophic rainfall or catastrophic conditions result in an overflow of the retention control structure (RCS). If Two Sisters discharges, it would be required to provide records of the overflow to TCEQ, so TCEQ can evaluate whether the overflow was unavoidable or whether an enforcement proceeding should be initiated.

The existing facility has 199 head of cattle. It was not required by TCEQ to obtain a permit, but instead operated under a permit by rule, in accordance with 30 Texas Administrative Code (TAC) § 321.47.

The facility would be located on the west side of County Road 209, approximately four miles south of the intersection of County Road 209 and US Highway 67. The intersection is located seven miles east of Stephenville in Erath County, Texas. This facility would also be located in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River Basin.

A CAFO was previously operated at this site by Gerald Oosten, but in 2002 the TCEQ (then operating under the name Texas Natural Resource Conservation Commission) denied a renewal application, after a contested case hearing.¹ The Oosten Order found that the unnamed tributary of Little Duffau Creek, downstream of the dairy, was eutrophic, and that discharges from the CAFO were a major cause, if not the sole cause of the tributary's eutrophic state. The Order also found that the downstream tributary ran constantly with polluted water and produced methane gas. Little Duffau Creek is also listed on the 2008 Federal Clean Water Act §303(d) list for bacterial impairment.

B. Procedural Background

The TCEQ received Two Sisters' application on August 18, 2008 and declared it administratively complete on September 24, 2008. The Notice of Receipt and Intent to Obtain Water Quality Permit (NORI) was published in the *Stephenville Empire Tribune* on October 17, 2008, in Erath County, Texas and in Spanish in *Tex-Mex Noticias* on October 23, 2008. The Notice of Application and Preliminary Decision (NAPD) was published again in the *Stephenville Empire Tribune* on December 12, 2008, in Erath County, Texas and in Spanish in *Tex-Mex Noticias* on December 10, 2008. The public comment period ended on February 6, 2009, and the deadline to request a contested case hearing was September 28, 2009.

¹ *An Order denying Gerald Oosten TPDES Permit No. 03142; TNRCC Docket No. 2000-0620-AGR; SOAH Docket No. 582-01-0033, May 31, 2002 (Oosten Order).*

TCEQ received one request for a contested case hearing from the Bosque River Coalition (the Coalition), submitted on September 28, 2009. Based on the Coalition's timely hearing request, OPIC recommends referring this application to SOAH for a contested case hearing.

II. ANALYSIS OF REQUESTS FOR CONTESTED CASE HEARINGS

A. Applicable Law

This application was declared administratively complete after September 1, 1999, and is subject to the requirements of Texas Water Code (TWC) § 5.556 added by Acts 1999, 76th Leg., Ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC § 55.201(d). 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." This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will 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 restrictions 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.

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, pursuant to 30 TAC § 55.209(e), responses 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 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.

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.²

The executive director, the public interest counsel, or the applicant may request that a group or association provide an explanation of how the group or association meets the requirements of 30 TAC § 55.205(a).

² 30 TAC § 55.205(a).

B. Determination of Affected Person Status

TCEQ received one hearing request from the Bosque River Coalition (the Coalition). Under 30 TAC § 55.205(a), a group or association seeking affected person status must show that one or more members of the group or association would otherwise have standing to request a hearing in their own right, the interests the group or association seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

The Coalition asserts that Chuck Markham is a member of the organization and would otherwise have standing to request a hearing in his own right. He owns property located about $\frac{3}{4}$ mile from the property boundary and less than one river mile downstream from the facility, on Little Duffau Creek.³ He uses his property for livestock, and uses Little Duffau Creek for picnicking and recreational purposes. He has expressed concern, through the Coalition, regarding the proposed discharge authorized by the draft permit, water quality, and the impact this may have on his use and enjoyment of his property. Chuck Markham is also concerned about other impacts to his quiet enjoyment of his property, due to his proximity to the proposed facility and previous impacts from the facility.

He also states that runoff from dairy operations have previously impacted him, referencing the Oosten Order.⁴ He previously participated in a hearing on the merits involving a CAFO located in the same place as the proposed CAFO that is the subject of this hearing request response. In that hearing, he participated as an affected person. The hearing ultimately led to the denial of the CAFO renewal application after a contested case hearing. Based on the information he provided in his hearing request, OPIC finds a reasonable relationship exists between Chuck Markham's interests claimed and the impact of the proposed permit on those interests.

Chuck Markham has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. Although a discharge authorized by the draft permit would be limited to certain circumstances, the draft permit

³ 30 TAC § 55.205(a)(1).

⁴ See *An Order denying Gerald Oosten TPDES Permit No. 03142*; TNRCC Docket No. 2000-0620-AGR; SOAH Docket No. 582-01-0033, May 31, 2002 (Oosten Order).

does authorize a discharge into waters of the state, and this discharge could impact the water quality of Little Duffau Creek, which he lives along and uses for recreational purposes. Furthermore, Two Sisters Dairy could present a threat to water quality if pollution generated at the facility enters the watershed through other means besides an authorized discharge.

The Coalition claims that the interests the group or association seeks to protect are germane to the organization's purpose.⁵ The Coalition's purpose is to further protection and enhancement of water quality in the Bosque River watershed. With this request for a contested case hearing, it is seeking to protect the very interests that led to the creation of the organization.

The issues raised by the Coalition and the relief requested of the TCEQ do not require the individual participation of Chuck Markham, but may be adequately represented by the Coalition.⁶

OPIC concludes that the Coalition has demonstrated a personal justiciable interest affected by the application, through showing it meets the requirements for associational standing set forth in 30 TAC § 55.205(a). We find a reasonable relationship exists between Chuck Markham's property interests claimed and the impact of the proposed permit on those interests.

Furthermore, the facility is located in an area that is home to many similar facilities, which, in the aggregate, may pose a threat to water quality. Therefore, based on the circumstances as presented in the record before the Commission, OPIC recommends the Commission find the Coalition is "affected."

C. Issues Raised in the Hearing Requests

The Coalition has raised forty seven issues. Each issue references the ED's numbered Response to Comments that it disputes.⁷ For the Commission's convenience,

⁵ 30 TAC § 55.205(a)(2).

⁶ 30 TAC § 55.205(a)(3).

⁷ See 30 TAC §§ 55.201(d)(4) ("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...")

OPIC has also included the comment or page number from the Coalition's comment letter that each issue addresses;

1. Whether the Draft Permit is adequately protective of the environmental health of the unnamed tributary of Little Duffau Creek, especially given previous impacts to the water body from previous operations at the site (Executive Director's Response to Public Comment ("RTC") No. 1) (Coalition Comments ("CC") No. 1).
2. Whether the Draft Permit is adequately protective of the health of Coalition members who depend on the continued recovery of water quality conditions in the unnamed tributary of Little Duffau Creek (RTC No. 1) (CC No. 1).
3. Whether allowing the expanded operation of the Dairy after permit issuance, but before the Dairy is required to meet the 25-year, 10-day rainfall event criteria, as is proposed in the Draft Permit, will further erode water quality in the unnamed tributary of Little Duffau Creek, and further risk the health and welfare of Coalition members (RTC Nos. 1, 8, and 23) (CC Nos. 1, 8, 9 and 12).
4. Whether the Applicant calculated a minimum treatment volume using an appropriately conservative volatile solids loading rate (RTC No. 2) (CC No. 2).
5. Whether the Applicant's failure to conduct soil samples based on the LMU designations actually proposed in the application does in fact present a "source of inaccuracy" that undermines the reliability of the applicant's NMP (RTC No. 3.) (CC No. 3).
6. Whether the Applicant's failure to submit sampling data for both Retention Control Structure ("RCS") No. 1 and RCS No. 2 undermines the reliability of the Applicant's NMP (RTC No. 4) (CC No. 4).
7. Whether the Applicant's process-generated wastewater estimate of 15 gallons per head per day is sufficiently conservative to be adequately protective of water quality and human health in the North Bosque River watershed (RTC No. 5) (CC No. 5).
8. Whether the Draft Permit is designed to adequately protect against runoff being directed into RCS No. 1 (RTC No. 7) (CC No. 7).
9. Whether RCS No. 1 currently has the actual ability to meet the 25-year, 24-hour rainfall event standard until the RCS is appropriately modified to meet the 25-year, 10-day rainfall event standard (RTC No. 8) (CC Nos. 8 and 9).

10. Whether evaporation volumes used in the water balance can be accurately determined by requiring an RCS stage/storage table that shows only storage volume at increments of one-foot of depth (RTC No. 9) (CC No. 10).
11. Whether the failure to require, and fully review, an RCS Management Plan for each RCS the Applicant would be entitled to use after permit issuance poses an unreasonable risk to water quality (RTC No. 10) (CC No. 11).
12. 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. 13 and 18) (CC Nos. 15 and 20).
13. Whether settling basins are properly designed, regulated, and certified to protect water quality (RTC Nos. 14, 15, and 16) (CC Nos. 16, 17 and 18).
14. Whether settling basin solids are properly characterized and regulated to protect water quality under the Draft Permit (RTC No. 17) (CC No. 19).
15. Whether capacity certification and requirements for RCSs are properly described and established in the Draft Permit to ensure water quality is protected (RTC No. 19) (CC No. 21).
16. Whether the settling basin certifications required by the Draft Permit are adequately protective of water quality (RTC Nos. 20 and 21) (CC No. 22).
17. Whether RCS embankment design, testing, and construction requirements in the Draft Permit are sufficiently protective of water quality (RTC Nos. 22 and 25) (CC No. 24).
18. Whether the liner certification and testing requirements in the Draft Permit are sufficiently protective of water quality (RTC Nos. 23 and 24) (CC Nos. 23, 25, 26 and 27).
19. Whether RCS construction soil qualities are appropriately articulated in the Draft Permit to ensure adequate protection of water quality (RTC No. 27) (CC No. 30).
20. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit (RTC No. 28) (CC No. 31).

21. Whether an adequate description of structural controls exists in the Draft Permit (RTC No. 29) (CC No. 32).
22. Whether the Applicant has demonstrated adequate dewatering capacity (RTC No. 30) (CC No. 33).
23. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected (RTC Nos. 31 and 32) (CC Nos. 34, 35, 36 and 37).
24. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality (RTC No. 33) (CC No. 38).
25. Whether the Draft Permit properly manages phosphorus production (RTC No. 34) (CC No. 39).
26. Whether removal of solid manure under the Draft Permit is adequate to meet water quality requirements for the North Bosque watershed (RTC No. 35) (CC Nos. 40 and 41).
27. Whether the Applicant's failure to employ curve numbers in the Phosphorous index that account for the Applicant's proposed LMU grazing will affect proposed application rates in a manner that threatens water quality (RTC No. 37) (CC No. 42).
28. Whether the Applicant's proposed LMU's are properly sized (RTC No. 38) (CC No. 43).
29. Whether the Applicant's projected crop yields for its LMUs are reasonable (RTC No. 39) (CC No. 44).
30. Whether the NMP adequately identifies soil test locations and timing (RTC No. 40) (CC No. 45).
31. Whether the NMP includes an application rate that will be adequately protective of water quality (CC No. 46).
32. Whether agronomic rates are properly calculated in the NMP (RTC No. 41) (CC No. 46).
33. Whether the Draft Permit sufficiently restricts the application of phosphorus to be adequately protective of water quality (RTC No. 42) (CC Nos. 47 and 48).

34. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality (RTC No. 43) (CC No. 49).
35. Whether the Draft Permit provisions regarding use of third party fields are adequate to protect water quality (RTC No. 44) (CC Nos. 49, 50, 51, 52, 53, 54, 61, 62 and 63).
36. Whether manure and wastewater application on third party fields will be properly managed and regulated to prevent degradation of water quality (CC Nos. 51, 52, 61 and 62).
37. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year (RTC No. 47) (CC No. 55).
38. Whether the historical waste application fields should be identified in the application or the Draft Permit (RTC No. 48) (CC No. 56).
39. Whether the Draft Permit provisions relating to silage, commodity, manure and hay storage area runoff are in fact “sufficient to reduce and/or prevent impacts to water quality from these areas” (RTC No. 49) (CC No. 57).
40. Whether the Draft Permit provides meaningful definition of vegetative buffers (RTC No. 51) (CC No. 59).
41. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards (RTC No. 52) (CC No. 40).
42. Whether the Draft Permit provisions authorizing the use of third-party fields are consistent with applicable law and are sufficiently protective of water quality (CC Nos. 51, 52, 61, 62 and 63).
43. Whether the Draft Permit establishes adequate reporting requirements for third party fields (RTC No. 54) (CC No. 62).
44. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields (RTC No. 55) (CC No. 63).
45. Whether the Draft Permit is in fact consistent with the North Bosque TMDL for phosphorous (RTC No. 56) (CC No. 64).
46. Whether the Applicant’s proposed increase in the number of cows at its facility will in fact increase instream phosphorous loading (RTC No. 56) (CC No. 56).

47. Whether the failure of the Draft Permit to account for increased nutrient loading demonstrated by the routine monitoring data from Little Duffau Creek will undermine the protection of water quality in the North Bosque River watershed (RTC No. 56) (CC No. 56).

D. Issues raised in Comment Period

All of the issues raised in his hearing request were also raised during the comment period. The Coalition, in its hearing request, referenced specifically the Comment response numbers in the *Executive Director's Response to Public Comment*. In the above section, OPIC has listed the specific Coalition comment that mentions the issue raised in the Coalition's hearing request. Each issue raised by the Coalition accurately reflects a comment or concern expressed during the comment period and does not go beyond the scope of the comments, although some issues encompass more than one comment. Furthermore, the Coalition's issues that question whether certain sections of the draft permit, RCS, application, or actions by the TCEQ are protective of water quality reference the larger concerns about water quality as expressed by the technically oriented comments.

E. Disputed Issues

There is no agreement between Requesters and the Applicant or Executive Director on the issues raised in the hearing requests.

F. Issues of Fact

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. All of the issues raised involve issues of fact. See 30 TAC §55.211(b)(3)(A) and (B).

G. Relevant and Material Issues

Hearing requests may raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). 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.⁸ Relevant and material issues are those governed by the substantive law under which this permit is to be issued.⁹

All of these issues raise specific questions about the draft permit or the application and ultimately relate to surface water quality. The TCEQ is responsible for the protection of surface water quality under Chapter 26 of the Texas Water Code.¹⁰ In addition, any application for a CAFO permit must comply with Chapter 321 and 307,¹¹ as well as other relevant TCEQ rules. Therefore, all of the issues raised by the Coalition are relevant and material to the Commission's decision on this application.¹²

The Coalition raises several issues regarding the retention control structure (RCS) management plan and the pollution prevention plan (PPP).¹³ Under 30 TAC § 321.42, an applicant must implement an RCS plan¹⁴ as a requirement of its individual permit.¹⁵ An applicant must also complete a PPP in accordance with 30 TAC § 321.46. Therefore all the Coalition's issues relating to the RCS, RCS management plan, and the PPP are relevant and material issues.

⁸ 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.").

⁹ *Id.*

¹⁰ Texas Water Code § 26.027(a) and § 26.003.

¹¹ See 30 TAC § 307.5(a) (antidegradation policy and implementation procedures apply to actions regulated under state and federal authority which would increase pollution of the water in the state, including authorized wastewater discharges, TMDLs, waste load evaluations, and any other miscellaneous actions, such as those related to man-induced nonpoint sources of pollution, which may impact the water in the state); 30 TAC § 307.4(a).

¹² Although all issues raised by the Coalition ultimately relate to water quality, the Coalition directly references protection of water quality in Issue Nos. 2, 7, 11, 13, 14, 15, 16, 17, 18, 19, 23, 24, 26, 27, 31, 33, 34, 36, 39, 41, 42, 44, and 47 of its *Request for Hearing for Two Sisters Dairy; TPDES Permit No. WQ0003259000 (Two Sisters Hearing Request)*, April 22, 2009.

¹³ See *Two Sisters Hearing Request*, Issue Nos. 1, 3, 6, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 22, 39, and 40.

¹⁴ 30 TAC § 321.42(g).

¹⁵ 30 TAC § 321.42(a).

The Coalition also raises issues regarding nutrients discharged from the site and the Applicant's plans to properly manage nutrients associated with the site.¹⁶ TCEQ rules state there must be a site-specific nutrient management plan (NMP) for all CAFOs.¹⁷ Further, nutrients are regulated under the Texas Surface Water Quality Standards¹⁸ 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 raises several issues regarding the land application of wastes generated by the facility.¹⁹ The Applicant must, at a minimum, comply with TCEQ rules governing the land application of manure, litter, or wastewater.²⁰ In addition, any application to land owned by third parties must comply with land application requirements.²¹

H. Issues Recommended for Referral

OPIC recommends the Commission refer the following disputed issues of fact to SOAH for a contested case hearing, and chooses to retain the exact language of the issues listed in the Coalition's hearing request, as this most accurately reflects the concerns of the requesting entity:

1. Whether the Draft Permit is adequately protective of the environmental health of the unnamed tributary of Little Duffau Creek, especially given previous impacts to the water body from previous operations at the site.
2. Whether the Draft Permit is adequately protective of the health of Coalition members who depend on the continued recovery of water quality conditions in the unnamed tributary of Little Duffau Creek.

¹⁶ See *Two Sisters Hearing Request*, Issue Nos.5, 24, 25, 26, 27, 29, 30, 31, 32, 33, 37, 45, 46, and 47.

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

¹⁸ 30 TAC, Chapter 307.

¹⁹ See *Two Sisters Hearing Request*, Issue Nos. 4, 12, 14, 26, 27, 28, 29, 34, 35, 36, 38, 42, 43, and 44.

²⁰ 30 TAC § 321.40.

²¹ 30 TAC § 321.42(j).

3. Whether allowing the expanded operation of the Dairy after permit issuance, but before the Dairy is required to meet the 25-year, 10-day rainfall event criteria, as is proposed in the Draft Permit, will further erode water quality in the unnamed tributary of Little Duffau Creek, and further risk the health and welfare of Coalition members.
4. Whether the Applicant calculated a minimum treatment volume using an appropriately conservative volatile solids loading rate.
5. Whether the Applicant's failure to conduct soil samples based on the LMU designations actually proposed in the application does in fact present a "source of inaccuracy" that undermines the reliability of the applicant's NMP.
6. Whether the Applicant's failure to submit sampling data for both Retention Control Structure ("RCS") No. 1 and RCS No. 2 undermines the reliability of the Applicant's NMP.
7. Whether the Applicant's process-generated wastewater estimate of 15 gallons per head per day is sufficiently conservative to be adequately protective of water quality and human health in the North Bosque River watershed.
8. Whether the Draft Permit is designed to adequately protect against runoff being directed into RCS No.1.
9. Whether RCS No. 1 currently has the actual ability to meet the 25-year, 24-hour rainfall event standard until the RCS is appropriately modified to meet the 25-year, 10-day rainfall event standard.
10. Whether evaporation volumes used in the water balance can be accurately determined by requiring an RCS stage/storage table that shows only storage volume at increments of one-foot of depth.
11. Whether the failure to require, and fully review, an RCS Management Plan for each RCS the Applicant would be entitled to use after permit issuance poses an unreasonable risk to water quality.
12. 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.
13. Whether settling basins are properly designed, regulated, and certified to protect water quality.

14. Whether settling basin solids are properly characterized and regulated to protect water quality under the Draft Permit.
15. Whether capacity certification and requirements for RCSs are properly described and established in the Draft Permit to ensure water quality is protected.
16. Whether the settling basin certifications required by the Draft Permit are adequately protective of water quality.
17. Whether RCS embankment design, testing, and construction requirements in the Draft Permit are sufficiently protective of water quality.
18. Whether the liner certification and testing requirements in the Draft Permit are sufficiently protective of water quality (RTC Nos. 23 and 24) (CC Nos. 23, 25, 26 and 27).
19. Whether RCS construction soil qualities are appropriately articulated in the Draft Permit to ensure adequate protection of water quality.
20. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit.
21. Whether an adequate description of structural controls exists in the Draft Permit.
22. Whether the Applicant has demonstrated adequate dewatering capacity.
23. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected.
24. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality.
25. Whether the Draft Permit properly manages phosphorus production.
26. Whether removal of solid manure under the Draft Permit is adequate to meet water quality requirements for the North Bosque watershed.
27. Whether the Applicant's failure to employ curve numbers in the Phosphorous index that account for the Applicant's proposed LMU grazing will affect proposed application rates in a manner that threatens water quality.
28. Whether the Applicant's proposed LMU's are properly sized.

29. Whether the Applicant's projected crop yields for its LMUs are reasonable.
30. Whether the NMP adequately identifies soil test locations and timing.
31. Whether the NMP includes an application rate that will be adequately protective of water quality.
32. Whether agronomic rates are properly calculated in the NMP.
33. Whether the Draft Permit sufficiently restricts the application of phosphorus to be adequately protective of water quality.
34. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality.
35. Whether the Draft Permit provisions regarding use of third party fields are adequate to protect water quality.
36. Whether manure and wastewater application on third party fields will be properly managed and regulated to prevent degradation of water quality.
37. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year.
38. Whether the historical waste application fields should be identified in the application or the Draft Permit.
39. Whether the Draft Permit provisions relating to silage, commodity, manure and hay storage area runoff are in fact "sufficient to reduce and/or prevent impacts to water quality from these areas."
40. Whether the Draft Permit provides meaningful definition of vegetative buffers.
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44. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields.
45. Whether the Draft Permit is in fact consistent with the North Bosque TMDL for phosphorous.
46. Whether the Applicant's proposed increase in the number of cows at its facility will in fact increase instream phosphorous loading.
47. Whether the failure of the Draft Permit to account for increased nutrient loading demonstrated by the routine monitoring data from Little Duffau Creek will undermine the protection of water quality in the North Bosque River watershed.

I. Maximum Expected Duration of Hearing

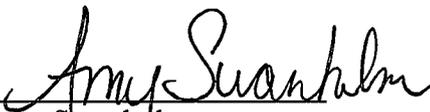
Commission Rule 30 TEX. ADMIN. CODE § 55.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TEX. ADMIN. CODE §55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be twelve months from the first date of the preliminary hearing until the proposal for decision is issued.

III. CONCLUSION

OPIC recommends granting the Bosque County Coalition's hearing request, and referring the above-referenced issues to the State Office of Administrative Hearings.

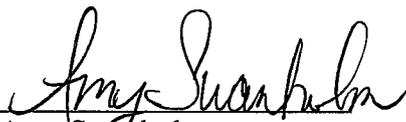
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2009 the original and seven true and correct copies of the Office of the Public Interest Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.


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