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November 9, 2009

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

**VIA HAND DELIVERY**

2009 NOV -9 PM 1:23  
CHIEF CLERKS OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Re: In the Matter of the Application by Two Sisters Dairy for Permit No. WQ0004866000; TCEQ Docket No. 2009-1606-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 one 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*  
Lauren J. Kalisek

LJK/jdg  
2402\04\tr091109\jk  
ENCLOSURE

cc: Mailing List

**MAILING LIST  
FOR PERMIT NO. WQ0004866000  
Two Sisters Dairy, LLC**

FOR THE CHIEF CLERK:

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TCEQ DOCKET NO. 2009-0709-AGR

APPLICATION BY  
TWO SISTERS DAIRY, LLC FOR  
TPDES PERMIT NO. WQ0004866000

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§

BEFORE THE TEXAS COMMISSION  
ON  
ENVIRONMENTAL QUALITY

NOV - 9 PM 1:26  
CHIEF CLERK'S OFFICE  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

REQUESTOR'S REPLY TO RESPONSE TO HEARING REQUEST

TO THE HONORABLE COMMISSIONERS:

THE BOSQUE RIVER COALITION, requestor in the above-referenced matter (the "Coalition"), files this Reply to the Executive Director's Response to Hearing Request and would respectfully show the Commissioners of the Texas Commission on Environmental Quality (the "Commission") the following:

I. BACKGROUND

Two Sisters Dairy (the "Dairy" or the "Applicant") applied to the TCEQ on August 18, 2008 for Texas Pollutant Discharge Elimination System ("TPDES") Permit No. WQ0004866000 for a Concentrated Animal Feeding Operation ("CAFO") (the "Application"). The Applicant requested authorization to expand its existing dairy facility (the "Facility") from 199 head to a maximum capacity of 5,500 head.

Following its technical review of the Application, the ED prepared a draft permit (the "Permit"). The Permit authorizes the Applicant to discharge wastewater into waters in the State from retention control structures ("RCS") at the Facility whenever chronic or catastrophic rainfall events or catastrophic conditions cause an overflow of such structures.<sup>1</sup> The Permit also authorizes precipitation-related runoff from land management units ("LMUs") at the Facility

<sup>1</sup> Permit VII.A.2.(a).

where wastewater, sludge and manure is applied if such application is in accordance with Permit conditions.<sup>2</sup> The Permit otherwise prohibits the drainage of wastewater, sludge or manure from an LMU.<sup>3</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>4</sup>

On September 28, 2009, the Coalition filed a timely request for hearing regarding the Permit identifying Mr. Chuck Markham as a Coalition member likely impacted by the regulated activities at the Facility (the "Coalition Hearing Request"). Mr. Markham qualifies as an affected person with respect to this proposed CAFO operation, as he owns property in close proximity, and downstream of, the Dairy property. Mr. Markham is concerned about the likely adverse impacts from the proposed operation to his legally-protected property interests, which includes the livestock operation he runs on the property, the recreational uses he makes of his property, and his right to quiet enjoyment of his property. On August 25, 2009, the ED provided his Response to Hearing Request (the "ED Response"). The ED acknowledges Mr. Markham's affected party status and recommends that the Coalition Hearing Request be granted. However, out of 64 discrete issues that the Coalition raised in its January 12, 2009 public comments on the Permit—none of which were subsequently withdrawn—the ED recommends that merely four of

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

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

<sup>4</sup> Permit VII.A.8.(e)(5)(i)(A)-(H), (ii), and (iii).

the issues that it addressed in its response to public comments ("RTC")<sup>5</sup> be referred to the State Office of Administrative Hearings ("SOAH") for a contested case hearing.

The Office of Public Interest Counsel ("OPIC") filed its Response to Request for Hearing on October 26, 2009 ("OPIC Response"). OPIC also recommends that the hearing request be granted. Recognizing that "each issue raised by the Coalition [in the Coalition Hearing Request] accurately reflects a comment or concern expressed during the comment period [that] does not go beyond the scope of the comments,"<sup>6</sup> OPIC recommends that all issues raised in the Coalition Hearing Request be referred to SOAH for a contested case hearing.

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.

**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 and that the Coalition should be recognized as an affected person for purposes of requesting a contested case hearing on the Permit. Thus, the Coalition respectfully requests that the Commission accept the recommendations of the ED and OPIC, and refer this matter to SOAH for a contested case hearing.

<sup>5</sup> The ED recommends that the issues raised by the Coalition in its public comment on the Permit as comment No. 28 (RTC No. 25), comment No. 30 (RTC No. 27), comment No. 38 (RTC No. 33), comment No. 45 (RTC No. 40) each be referred to SOAH.  
<sup>6</sup> Office of Public Interest Counsel's Response to Request for Hearing, at 11.

## B. Disputed Issues Raised in the Request for Hearing

Although there is some agreement that the Coalition Hearing Request be granted as between the ED, OPIC and the Coalition, there remains a wide disparity with regard to the scope of the hearing and the issues to be referred. The Commission, by rule, may refer an issue to SOAH only where the issue (1) involves a disputed fact question; (2) was raised during the public comment period; and (3) is relevant and material to the decision on the application.<sup>7</sup> While the Coalition asserts, and OPIC agrees, that all of the issues identified in the Coalition Hearing Request meet these criteria, the ED believes that only four limited issues should be referred. Such a limited referral, however, does not reflect the breath and depth of the fact issues properly raised in the comment period and carried forward into the Coalition Hearing Request.

On January 12, 2009, the Coalition submitted 64 distinct concerns regarding the Permit during the public comment period. In the RTC, the ED responded to the Coalition's comments through 56 separate responses. In some instances the ED simply failed to acknowledge comments.<sup>8</sup> In many more instances, however, the ED attempted to address multiple comments within a single response without expressly indicating such, and without otherwise clarifying the specific Coalition comments to which its response was directed. The ED's refusal to respond to the Coalition comment-by-comment, resulted in an RTC that is difficult to correlate with each discrete public comment that it purports to address.

In effort to avoid any further confusion, while still complying with Commission rules,<sup>9</sup> the Coalition framed its hearing request by providing summaries of disputed ED responses to the Coalition's comments. At the same time, the Coalition attempted to recapture the corresponding concerns originally raised in its January 12, 2009 comments. Nevertheless, the ED complains

<sup>7</sup> 30 Tex. Admin. Code § 50.115(c).

<sup>8</sup> See Issues No. 31, 36, and 42 of the Coalition Hearing Request.

<sup>9</sup> *Id.* § 50.201(d)(4).

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>10</sup> The ED appears determined to prevent the Permit from being subjected to any meaningful review at SOAH by rephrasing the Coalition’s concerns. Nevertheless, its efforts cannot conceal the fact that the issues identified in the Coalition Hearing Request were clearly intended to capture the essence of the comments it made during the public comment period—despite the unnecessary difficulty in doing so caused by the ED’s practice of blending multiple public comments into one singular response without clear attribution.

The ED’s categorization of these issues as “overbroad” instead appears to be an attempt to avoid addressing fact issues that, if subjected to the type of review afforded by a contested case hearing, could implicate the reliability of many assumptions routinely integrated into draft permits like the Permit. The Coalition does not believe that it needs to “bring in issues not raised during the comment period.” It believes instead that it has already raised an ample number of disputed fact issues regarding the underprotective nature of the Permit.

Accordingly, the Coalition respectfully requests that the Commission refer each of the 47 disputed fact issues raised in the Coalition Hearing Request, attached hereto as Exhibit 1 and incorporated herein by this reference for all purposes as if set forth verbatim, to SOAH for an evidentiary hearing testing the merits of each. There is little that seems to distinguish these issues from those the ED agrees should be referred, as listed below:

- No. 1 Whether the compaction testing specifications comply with the CAFO rule requirements. (RTC No. 25) (Coalition Comment No. 28)**
- No. 2 Whether the draft permit meets the requirements in 30 TAC § 321.38(g)(1) regarding including the standards for quality of soils used in construction of the RCS. (RTC No. 27) (Coalition Comment No. 30)**

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<sup>10</sup> ED Response, p. 6.

- No. 3 Whether the draft permit requirements for sampling of wastewater and manure are compliant with the CAFO rule requirements. (RTC No. 33) (Coalition Comment No. 38)
- No. 4 Whether the draft permit is consistent with NRCS Code 590 as required by 30 TAC § 321.42(i)(5)(A) with regards to the approximate locations of soil samples and time of year sampling will be conducted. (RTC No. 40) (Coalition Comment No. 45)

Each of the issues raised in the Coalition Hearing Request are clearly relevant and material to the decision on the application in that they (1) challenge whether the Applicant has or can meet its burden of proof in showing that it has satisfied all applicable rules of the Commission in its Application, and (2) address whether specific requirements and conditions of the Permit will adequately protect affected persons like Mr. Markham and the Bosque River watershed from runoff and all other potential impacts directly attributable to operations at the Facility.

**1. Relevant and Material Issues**

Materiality is the connection between underlying issues of the dispute, as developed by the substantive law, and the proposition for which evidence is offered, or in the context of this proceeding, the proposition for which comments were offered.<sup>11</sup> Relevancy is the tendency to make more probable or less probable a material proposition.<sup>12</sup> The issues cited by the Coalition each satisfy the materiality and relevancy requirement because they each directly address the probability of material propositions, as those propositions ascertained from the applicable provisions of Chapter 26 of the Texas Water Code, and Chapters 307 and 321 of Title 30, Texas Administrative Code.

<sup>11</sup> *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994).

<sup>12</sup> TEX. R. EVID. 401; *Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001).

## 2. Disputed Issues of Fact

The ED often dismisses factual issues raised by the Coalition as matters of law by suggesting that there are no specific rules that address the discrete issues raised by the Coalition, and therefore no legal requirement that it consider the merits of the Coalition's concerns. In its hasty retreat to this position, however, the ED routinely fails to acknowledge the chief legal requirement at the heart of each of the Coalition's disputed fact issues—the requirement that “[e]ach permit shall contain terms and conditions...necessary to protect human health and safety, and the environment.”<sup>13</sup>

The mere fact that the Coalition raises a concern with the Facility that is not specifically addressed in TCEQ's regulations does not turn a fact question into a question of law. Texas courts have addressed the difference between a disputed issue of fact and a question of law.<sup>14</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 on the conclusion of the issue.<sup>15</sup> The ED's reaction to the Coalition's public comments and the issues raised in the Coalition Hearing Request is itself evidence that there is no consensus between the Coalition and the ED on these fact issues. 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.

Whether specifically addressed in TCEQ regulations or not, the fact issues raised by the Coalition remain disputed issues, and they each are relevant and material to the determination of the Facility's application. Therefore, all of the issues raised in the Coalition Hearing Request are appropriate for referral to SOAH. Of the 47 disputed fact issues raised in the Coalition Hearing

<sup>13</sup> 30 Tex. Admin. Code § 321.36(b).

<sup>14</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>15</sup> *Lehman v. Wiegat*, 917 S.W.2d 379, 382 (Tex. App.—Houston[14 Dist.] 1996, writ denied) (citing *Southwest Wheel & Mfg. Co. v. Shotts*, 501 S.W.2d 387 (Tex. App.—Beaumont 1973, writ ref'd n.r.c.)).

Request, however, there are several overarching issues that are most critical to determining whether the proposed operation will adversely impact water quality in the Bosque River watershed and whether the permittee will be able to comply with the terms and conditions of the Permit. These issues include 1) adequacy of the design and construction of structural controls to prevent unauthorized discharges; 2) proper operation and management of RCSs also to prevent unauthorized discharges; and 3) proper nutrient application during waste disposal to avoid overburdening fields and avoiding nutrient runoff. Each of the issues in the Coalition Hearing Request is related to one or more of these topics. Examples of where disputed fact issues identified in the Coalition's Hearing Request address these concerns are provided below. The Coalition will address each below by reference to its corresponding number in the Coalition Hearing Request:

**Issue No. 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) (Coalition Comment No. 3)**

In its comment No. 3, the Coalition brings to the ED's attention the fact that the Applicant admits that its nutrient management plan ("NMP") was based on samples taken from LMUs that do not correspond to the LMUs proposed in the Application. The Coalition commented that this lack of correlation calls into question the reliability of the assumptions used in the Applicant's NMP. The Coalition thus requested that the ED require the Applicant to resubmit an NMP that is based on samplings from the appropriately configured LMUs. The ED responds that "[t]his *should* not present a source of inaccuracy as all LMUs are subdivisions of older LMUs."<sup>16</sup> The ED's opinion here is appreciated, but unless it is given under oath in a contested case hearing, it is nothing more in this context than a mere opinion. It resolves no

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<sup>16</sup> ED Response, at 3 (emphasis added).

dispute. In fact, the ED seems to miss the point entirely in its response. The issue is not whether the Applicant's failure to sample LMUs that match the LMUs proposed in the Application *should* or *should not* present a source of inaccuracy. The issue is whether the Applicant's failure *does* or *does not* present a source of inaccuracy. The Coalition clearly believes that it does—thus, it raised the issue in its comment No. 3. The Coalition's comment clearly identifies a fact question regarding proper assessment of background nutrient loads and the potential nutrient runoff impact that the ED, whether it intended to or not, apparently disputes. Even the ED acknowledges that this issue presents a disputed issue of fact, yet it nevertheless advocates that this issue should be spared from referral.<sup>17</sup> The disputed fact issues captured by this component of the Coalition Hearing Request should be referred to SOAH.

**Issue No. 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 No. 13) (Coalition Comment No. 15)**

In Coalition Comment No. 15, the Coalition challenges the Applicant's use of formulae from the Kansas Agricultural Field Waste Handbook for calculating the anticipated sludge accumulation volume on its proposed RCS No. 2. Clearly, the Coalition takes issue with the Applicant's purported approach in calculating the volumes of sludge that RCS No. 2 will be able to capture. It provided no values or justification for the use of this particular formula in the Application. In the ED Response, it issues the following edict: "As a matter of law, the ED accepts the methodology used by the Applicant for estimating the sludge accumulation rate for runoff from the open lot areas." As a matter of fact, however, the Coalition does not. Notwithstanding the ED's clamor to magic words, the ultimate question is whether the Applicant's approach is reliable in the context of this specific Application. The ED attempts to dismiss this issue in its RTC by pronouncing that the Applicant's methodology "is considered

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<sup>17</sup> ED Response, at 8.

acceptable for use in Texas.”<sup>18</sup> By whom? In all cases? Was the methodology considered acceptable for use in a major sole source impairment zone, or just the parts of Texas that are the closest to Kansas? This issue specifically touches the Coalition’s concern regarding the ability of the Applicant to properly manage its RCSs. Clearly, a disputed fact issue exists here, despite the ED’s attempt to shroud it. The disputed fact issues captured by this component of the Coalition Hearing Request should be referred to SOAH.

**Issue No. 13 Whether settling basins are properly designed, regulated, and certified to protect water quality. (RTC Nos. 14, 15, and 16) (Coalition Comment Nos. 17 and 18)**

The Coalition directly challenges both the reliability of the solids removal efficiency estimation employed by the Applicant in the Application, as well as the veracity of its claim that its proposed settling basin will maintain a 50 percent removal efficiency after commencement of operations. Again, these issues relate to concerns regarding the adequacy of structural controls. The Coalition notes that the textbook cited by the Applicant as its source for the removal efficiency assumption makes clear that the assumption corresponds to a particular settling basin design that the Applicant appears not to have used. This creates the potential for excessive sludge accumulation that, when combined with the liberal sludge management protocols that are required by the Permit, will pose a direct threat to water quality. The ED dismissively responds, in essence, that the Permit will take care of these concerns. This circular reasoning is not unlike the ED’s routine suggestion that an otherwise affected person be denied the opportunity to seek a test of the merits of CAFO applications and draft permits on the ground that a person is *per se* not adversely affected by potential discharges from a CAFO operating under one of the ED’s draft permits because the permits do not allow any discharges from the CAFO into waters of the State except in the event of a qualifying rainfall event. Such an argument is akin to saying that a

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<sup>18</sup> RTC No. 13.

requestor would not constitute an affected person for a contested case hearing on a TPDES permit application for a Publicly Owned Treatment Works because the TPDES permit does not allow the exceedance of its effluent limits.

What the ED refuses to acknowledge in both instances is that the existence of the Permit makes *no guarantee* that no discharge will occur simply because the ink on the Permit says that such a discharge is not allowed. And in the context of the type of review undertaken by the ED for CAFO permits like the one sought by the Applicant, the Permit provides no assurances that the Applicant is actually capable of accomplishing what the Permit and CAFO rules say it must accomplish, or, more importantly, preventing what the Permit and CAFO rules say it must prevent. The ED appears satisfied here that the ink on the Permit—which was developed using in part the Applicant's apparently unfounded assumptions—will ensure that this Applicant will be capable of managing rapid sludge accumulations without further impairing water quality. The Coalition's comment raises fact issues to which the ED refuses to concede. The disputed fact issues captured by this component of the Coalition Hearing Request should be referred to SOAH.

**Issue No. 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) (Coalition Comment No. 42)**

In its comment No. 42, the Coalition challenges the Applicant's use of curve numbers for the Phosphorous Index based on LMUs that will not be grazed, even though the Applicant proposes to graze all but one of its LMUs. The Coalition clearly identifies this inconsistency and requests that the ED require the Applicant to make appropriate adjustments to its NMP. The ED's response is that it accepts the Applicant's approach. The Coalition does not, however, and with its comment it has raised a fact issue regarding the Applicant's nutrient application rate and

the related nutrient runoff issues that remains in dispute. The disputed fact issues captured by this component of the Coalition Hearing Request should be referred to SOAH.

### III. CONCLUSION

The position taken by the ED in the ED Response calls into question the entire point of submitting public comments on a CAFO application and draft permit like the Application and the Permit. Unfortunately, the ED appears to view the Coalition's comments with a categorically defensive eye, when the Coalition instead perceived the public comment opportunity as a chance to raise issues that would ultimately benefit water quality within the Bosque River watershed if objectively considered. From the perspective of the Coalition, the ED Response demonstrates a calculated effort to mischaracterize the underlying concerns identified in the Coalition's public comments, as captured by the Coalition Hearing Request. The result, disappointingly, is that the ED appears to be inclined to prevent meaningful participation in a process that is designed to reveal facts and result in a more protective permit. The Coalition has difficulty understanding how human health and safety, and the environment, are advantaged by such a posture.

### IV. PRAYER FOR RELIEF

The ED and OPIC each agree that the Coalition Hearing Request should be granted, and the case referred to SOAH for a contested case hearing. The Coalition and OPIC agree that all issues raised in the Coalition Hearing Request should be referred to SOAH for a contested case hearing testing the merits of each. 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 on all disputed fact issues raised in Exhibit 1.

Respectfully submitted,

**LLOYD GOSSELINK**  
**ROCHELLE & TOWNSEND, P.C.**  
816 Congress Ave., Suite 1900  
Austin, Texas 78701  
(512) 322-5810  
(512) 472-0532 (Fax)

By:   
**LAUREN KALISEK**  
State Bar No. 00794063

**ATTORNEYS FOR**  
**BOSQUE RIVER COALITION**



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**THE COPY**

1984 *25 Years* 2009

Mr. Rochelle's Direct Line: (512) 322-5810  
mrochelle@lglawfirm.com

September 28, 2009

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

**VIA HAND DELIVERY**

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
SEP 29 PM 3:51  
CHIEF CLERKS OFFICE

Re: Request for Hearing for Two Sisters Dairy, LLC:  
TPDES Permit No. WQ0004866000 (2402-4)

Dear Ms. Castañuela:

Please accept this letter submitted on behalf of my client, the Bosque River Coalition (the "Coalition"), a Texas non-profit corporation, consisting of property owners located in the vicinity of the dairy that is the subject of draft TPDES Permit No. WQ0004866000 (the "Draft Permit") for Two Sisters Dairy, LLC (hereinafter, the "Dairy" or "the Applicant"). The purpose of this letter is to request a contested case hearing regarding the Draft Permit. The Coalition also hereby requests that it be placed on the mailing list so that it may remain informed on the status of the Draft Permit.

**CONTESTED CASE HEARING REQUEST**

Pursuant to specific requirements of a request for a contested case hearing under Title 30, Sections 55.201, 55.203, 55.205 and 50.115 of the Texas Administrative Code, those same requirements being set forth in the August 27, 2009, Decision of the Executive Director on the Draft Permit, the Coalition offers the following:

**Hearing Request Requirements**

*General Requirements*

The Coalition requests a contested case hearing. The Applicant is Two Sisters Dairy, LLC, and the Draft Permit is TPDES Permit No. WQ0004866000.

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

Ms. LaDonna Castañuela  
September 28, 2009  
Page 2

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

SEP 23 PM 3:51

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

CHIEF CLERKS OFFICE

#### *Requirements for a Group or Association*

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

#### *Requirements for an Affected Person*

Mr. Chuck Markham is a member of the Coalition, with property located about 3/4 mile from the property boundaries of the Dairy and less than one river mile downstream from the Dairy. Mr. Markham qualifies as an affected person under Title 30, Section 55.203 of the Texas Administrative Code with a personal justiciable interest not common to the general public in that his property fronts an unnamed tributary of Little Duffau Creek (the "Creek"), the water body into which the Dairy's discharges and runoff will drain, and he has been previously impacted by operations at this site.

Mr. Markham runs livestock on his property that are watered from the Creek, and he and his family also use the Creek for picnicking and recreational purposes. Mr. Markham is concerned that the proposed discharge authorized by the Draft Permit, and the resulting effects on water quality in the Creek, threaten to erode the use and enjoyment he and his family are able to make of the Creek, which has already been harmed by prior dairy operations at this very site. Such harm is detailed in the Coalition's January 12, 2009 comments on the Draft Permit as well as a May 31, 2002 Commission Order ("2002 Order") regarding such operations that is attached to such comments. For convenient reference, the Coalition's January 12, 2009 comments are enclosed as Attachment A, and the 2002 Order is enclosed as Attachment B—both are fully incorporated herein, by reference. As noted in the Coalition's comments and the 2002 Order, Mr. Markham participated as a party in a contested case hearing regarding a permit renewal for previous dairy operations at the site, and the permit renewal was denied by the Commission due, in part, to significant degradation of the Creek resulting from the upstream dairy operations. This current application seeks a new permit for more than double the size of the previous operation—5,500 head. Given Mr. Markham's history of impacts from operations at this site, as recognized in the 2002 Order, he clearly meets the requirements as an affected person for an application to significantly increase such operations. Mr. Markham is further concerned about

Ms. LaDonna Castañuela  
September 28, 2009  
Page 3

other impacts that the Dairy has on his right to the quiet enjoyment of his private property. Please see the enclosed map at Attachment C for reference purposes.

*Disputed Issues of Fact*

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

1. Whether 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).
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).
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).
4. Whether the Applicant calculated a minimum treatment volume using an appropriately conservative volatile solids loading rate (RTC 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.)
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).
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).
8. Whether the Draft Permit is designed to adequately protect against runoff being directed into RCS No. 1 (RTC 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).
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).

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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).
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).
13. Whether settling basins are properly designed, regulated, and certified to protect water quality (RTC Nos. 14, 15, and 16).
14. Whether settling basin solids are properly characterized and regulated to protect water quality under the Draft Permit (RTC No. 17).
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).
16. Whether the settling basin certifications required by the Draft Permit are adequately protective of water quality (RTC Nos. 20 and 21).
17. Whether RCS embankment design, testing, and construction requirements in the Draft Permit are sufficiently protective of water quality (RTC Nos. 22 and 25).
18. Whether the liner certification and testing requirements in the Draft Permit are sufficiently protective of water quality (RTC Nos. 23 and 24).
19. Whether RCS construction soil qualities are appropriately articulated in the Draft Permit to ensure adequate protection of water quality (RTC No. 27).
20. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit (RTC No. 28).
21. Whether an adequate description of structural controls exists in the Draft Permit (RTC No. 29).
22. Whether the Applicant has demonstrated adequate dewatering capacity (RTC No. 30).
23. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected (RTC Nos. 31 and 32).
24. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality (RTC No. 33).
25. Whether the Draft Permit properly manages phosphorus production (RTC No. 34).
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).
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).
28. Whether the Applicant's proposed LMU's are properly sized (RTC No. 38).
29. Whether the Applicant's projected crop yields for its LMUs are reasonable (RTC No. 39).
30. Whether the NMP adequately identifies soil test locations and timing (RTC No. 40).

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31. Whether the NMP includes an application rate that will be adequately protective of water quality (Coalition Comment No. 46 [please note that the Executive Director provided no response to this comment]).
32. Whether agronomic rates are properly calculated in the NMP (RTC No. 41).
33. Whether the Draft Permit sufficiently restricts the application of phosphorus to be adequately protective of water quality (RTC No. 42).
34. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality (RTC No. 43).
35. Whether the Draft Permit provisions regarding use of third party fields are adequate to protect water quality (RTC No. 44).
36. Whether manure and wastewater application on third party fields will be properly managed and regulated to prevent degradation of water quality (Coalition Comments Nos. 51 and 52 [please note that the Executive Director provided no response to these comments] and RTC Nos. 45 and 46).
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).
38. Whether the historical waste application fields should be identified in the application or the Draft Permit (RTC No. 48).
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).
40. Whether the Draft Permit provides meaningful definition of vegetative buffers (RTC No. 51).
41. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards (RTC No. 52).
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 (Coalition Comments Nos. 51 and 52 [please note that the Executive Director provided no response to these comments] and RTC Nos. 43, 44, 45, 46, 53, 54, and 55).
43. Whether the Draft Permit establishes adequate reporting requirements for third party fields (RTC No. 54).
44. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields (RTC No. 55).
45. Whether the Draft Permit is in fact consistent with the North Bosque TMDL for phosphorous (RTC No. 56).
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).
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).

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

Sincerely,



Martin C. Rochelle

MCR/ldp  
2402\04\Two Sisters\tr090928jth  
ENCLOSURES

cc: Attached Mailing List (via regular mail)

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 28th day of September, 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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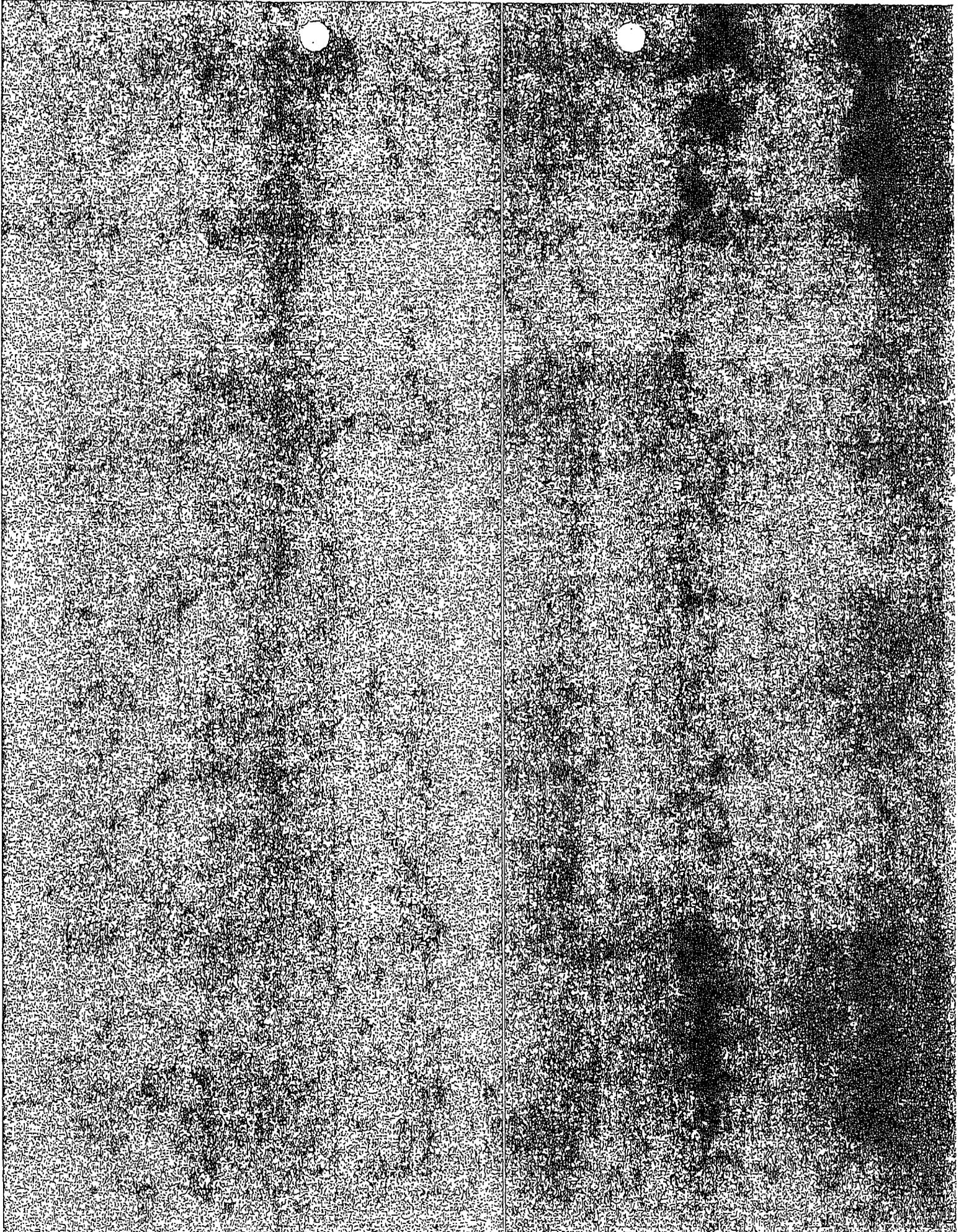
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