

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: **JOSEPH WILSON OSINGA, JENNIFER SHEREE OSINGA, BERT MARCEL  
VELSEN, HEIDI VELSON DBA OSVE DAIRY  
TCEQ DOCKET NO. 2009-1634-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. 2009-1634-AGR**

<b>IN THE MATTER OF</b>	<b>§</b>	<b>BEFORE THE TEXAS</b>
<b>THE APPLICATION OF</b>	<b>§</b>	
<b>JOSEPH WILSON</b>	<b>§</b>	
<b>OSINGA, JENNIFER</b>	<b>§</b>	<b>COMMISSION ON</b>
<b>SHEREE OSINGA, BERT</b>	<b>§</b>	
<b>MARCEL VELSEN,</b>	<b>§</b>	
<b>HEIDI VELSEN dba</b>	<b>§</b>	<b>ENVIRONMENTAL</b>
<b>OSVE DAIRY FOR</b>	<b>§</b>	
<b>TPDES PERMIT NO.</b>	<b>§</b>	
<b>WQ0003682000</b>	<b>§</b>	<b>QUALITY</b>

**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**

Joseph Wilson Osinga, Jennifer Sheree Osinga, Bert Marcel Velsen & Heidi Velsen dba Osve Dairy (Osve Dairy) has applied for a Major Amendment of its existing permit and a conversion to an individual permit for their Concentrated Animal Feeding Operation (CAFO). Osve Dairy requests authorization to expand its existing dairy cattle facility from 850 head to a maximum capacity of 1,600 head, of which 700 head are milking cows, to add an existing young stock facility adjacent to the existing permitted property, and to increase the number of acres used for land application of wastes and

wastewater to 219 acres. The retention control structure (RCS) would be increased from a capacity of 48.82 acre-feet to 51.10 acre-feet.

Discharges to surface water would be allowed when chronic or catastrophic rainfall or catastrophic conditions result in an overflow of the RCS. If Osve Dairy 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 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 is located on the east side of U.S. Highway 281, approximately 10 miles south of the city limits sign of Stephenville, in Erath County, Texas, in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River Basin. This facility would also be located in the drainage area of the North Bosque River in Segment No. 1226 of the Brazos River Basin.

## **B. Procedural Background**

The TCEQ received Osve Dairy's application on May 9, 2007 and declared it administratively complete on July 20, 2007. The Notice of Receipt and Intent to Obtain Water Quality Permit (NORI) was published in the *Stephenville Empire Tribune* on August 2, 2007, in Erath County, Texas and in Spanish in *Tex-Mex Noticias* on August 9, 2007. The Notice of Application and Preliminary Decision (NAPD) was published in *Stephenville Empire Tribune* on November 11, 2008 and in Spanish in *Tex-Mex Noticias* on November 13, 2008. The public comment period ended on December 15, 2008, and the deadline to request a contested case hearing was October 5, 2009.

TCEQ received one request for a contested case hearing from the Bosque River Coalition (the Coalition), submitted on October 5, 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, 76<sup>th</sup> 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.<sup>1</sup>

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).

#### **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 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

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<sup>1</sup> 30 TAC § 55.205(a).

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.

The Coalition asserts that Mary M. Cassleman, is a member of the organization and would otherwise have standing to request a hearing in her own right. She owns 209 acres that abut Osve Dairy.<sup>2</sup> The Executive Director has confirmed that Ms. Cassleman's property shares a property boundary line with Osve Dairy. She has expressed concern, through the Coalition, regarding odor and waste irrigation seriously impacting her use and enjoyment of her property. She states that runoff from Osve Dairy has infiltrated her stock tanks, causing nutrient overloads and fish kills. She is also concerned that deficiencies in the draft permit will continue to impact her use and enjoyment of her property. Based on this information, OPIC finds a reasonable relationship exists between Mary M. Cassleman's property interests claimed and the impact of the proposed permit on those interests.

OPIC finds that Ms. M. Cassleman has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. First, although a discharge authorized by the draft permit would be limited to certain circumstances, the draft permit does authorize a discharge into waters of the state. Furthermore, Osve Dairy could present a threat to water quality if pollution generated at the facility enters the watershed through other means besides an authorized discharge. Second, Ms. Cassleman's concerns are not solely tied to a discharge into waters of the state. She mentions problems with odors from the facility, as well as problems with runoff from the facility to her land. These potential problems are not necessarily tied to Osve Dairy's potential authorization to intermittently discharge, but to the daily operations of the facility, and the draft permit that would regulate those operations. Therefore, OPIC finds that she would have standing to contest Osve Dairy's application in her own right.

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<sup>2</sup> 30 TAC § 55.205(a)(1).

The Coalition claims that the interests the group or association seeks to protect are germane to the organization's purpose.<sup>3</sup> 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 Mary M. Cassleman, but may be adequately represented by the Coalition.<sup>4</sup>

OPIC concludes that the Coalition meets the requirements for associational standing set forth in 30 TAC § 55.205(a). We find a reasonable relationship exists between Mary M. Cassleman's property interests claimed and the impact of the proposed permit on those interests. The interests the Coalition seeks to protect are germane to its purpose, and individual members' participation is not required.

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 and the reasons stated above, OPIC recommends the Commission find the Coalition is "affected."

### **C. Issues Raised in the Hearing Requests**

The Coalition has raised forty eight issues. Each issue references the ED's numbered Response to Comments that it disputes.<sup>5</sup> For the Commission's convenience, OPIC has also included the comment or page numbers from the City of Waco's comment letter that each issue addresses;

1. Whether the Applicant has used the appropriate screen separator efficiencies in its minimum treatment volume and sludge volume calculations (Executive Director's Response to Public Comment ("RTC") No. 5) (City of Waco comment letter ("CC") No. 1 and 2).

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<sup>3</sup> 30 TAC § 55.205(a)(2).

<sup>4</sup> 30 TAC § 55.205(a)(3).

<sup>5</sup> 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...")

2. Whether Retention Control Structure (“RCS”) No. 1 and No. 2 are properly designed, and will be appropriately operated, to prevent further degradation of water quality (RTC No. 6) (CC Nos. 3, 4, and 5).
3. Whether the Applicant’s proposal to route all contaminated storm runoff from the open lots into RCS No. 1 does in fact satisfy TCEQ rules regarding storm water runoff containment (RTC No. 6) (CC No. 4).
4. Whether the provisions in the Draft Permit that would allow the Applicant to substantially modify RCS No. 1 and No. 2 after permit issuance by removing the berm that separates the two RCSs is sufficiently protective of water quality (RTC No. 6) (CC No. 5).
5. Whether the Applicant’s estimated 20 gallons per head per day of process generated wastewater will adequately account for all wastewater generation at the facility (RTC Nos. 9, 10 and 11) (CC No. 9).
6. Whether the Applicant can in fact contain stormwater runoff during the period of time after permit issuance before the Applicant is required to complete its proposed RCS enlargement (RTC Nos. 12, 13 and 26) (CC No. 12).
7. 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. 14) (CC No. 14).
8. 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 Nos. 15 and 16) (CC Nos. 15 and 16).
9. Whether the Applicant’s proposed location of manure stockpiles will undermine water quality (RTC No. 16) (CC No. 17).
10. Whether the Draft Permit accounts for all pen areas intended for use by the Applicant (RTC No. 16) (CC No. 18).
11. Whether the Draft Permit provisions regarding the storage of slurry within RCS drainage areas are adequately protective of water quality (RTC No. 17) (CC No. 19).
12. Whether settling basins are properly designed, regulated, and certified to protect water quality (RTC Nos. 18 and 19) (CC Nos. 20 and 21).

13. 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. 20 and 22) (CC Nos. 22 and 24).
14. Whether settling basin solids are properly characterized and regulated to protect water quality under the Draft Permit (RTC No. 21) (CC No. 23).
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. 23) (CC No. 25).
16. Whether the Draft Permit requires sufficiently comprehensive settling basin certifications to be adequately protective of water quality (RTC Nos. 24) (CC No. 26).
17. Whether RCS No. 3 is designed, and was constructed, in a manner that renders it sufficiently protective of water quality between the time of permit issuance and the time the Applicant eventually modifies the RCS (RTC Nos. 25 and 26) (CC No. 27).
18. Whether the liner certification and testing requirements in the Draft Permit are sufficiently protective of water quality (RTC No. 27) (CC Nos. 28 and 29).
19. Whether RCS construction soil qualities are appropriately articulated in the Draft Permit to ensure adequate protection of water quality (RTC No. 30) (CC No. 32).
20. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit (RTC No. 32) (CC No. 34).
21. Whether an adequate description of structural controls exists in the Draft Permit (RTC No. 33) (CC No. 35).
22. Whether the Applicant has demonstrated adequate dewatering capacity (RTC No. 34) (CC No. 36).
23. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected (RTC No. 35) (CC Nos. 37, 38, and 39).
24. Whether the Applicant is able to demonstrate that its proposed structural controls are adequately designed to properly protect against water quality degradation (RTC No. 36) (CC No. 40).

25. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality (RTC No. 37) (CC No. 41).
26. Whether the Draft Permit properly manages phosphorus production (RTC No. 38) (CC No. 42).
27. Whether the Applicant's proposed LMU's are properly sized (RTC No. 41) (CC No. 45).
28. Whether the Applicant has established proper boundaries for LMU No. 2 (RTC . No. 42) (CC No. 46).
29. Whether the Applicant's projected crop yields for its LMUs are reasonable (RTC No. 43) (CC No. 47).
30. Whether the NMP adequately identifies soil test locations and timing (CC No. 48).
31. Whether agronomic rates are properly calculated in the NMP (RTC No. 44) (CC No. 49).
32. Whether the Draft Permit sufficiently restricts the application of phosphorus to be adequately protective of water quality (RTC Nos. 45 and 46) (CC Nos. 50 and 51).
33. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality (RTC No. 47) (CC No. 52).
34. Whether the Draft Permit provisions regarding wastewater application on third-party fields are adequate to protect water quality (RTC No. 48) (CC No. 53).
35. Whether the Draft Permit provisions regarding use of third party fields are adequate to protect water quality (RTC No. 49) (CC Nos. 54, 55, 56, and 57).
36. Whether the Applicant should be required to prepare an NMP for third-party fields (CC No. 55).
37. Whether phosphorous crop removal rates from third-party fields are adequately regulated under the Draft Permit to prevent degradation of water quality (CC No. 56).

38. Whether manure and wastewater application on third party fields will be properly managed and regulated to prevent degradation of water quality (RTC No. 50) (CC Nos. 52 and 53).
39. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year (RTC No. 51) (CC No. 58).
40. Whether the historical waste application fields should be identified in the application or the Draft Permit (RTC No. 52) (CC No. 59).
41. 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. 53) (CC No. 60).
42. Whether the Draft Permit provides meaningful definition of vegetative buffers (RTC No. 54) (CC No. 61).
43. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards (RTC No. 55) (CC No. 62).
44. Whether the Draft Permit has been designed to adequately account for the Applicant’s demonstrated lack of compliance with applicable TCEQ rules (RTC No. 56) (CC No. 63).
45. Whether the Draft Permit establishes adequate reporting requirements for third party fields (RTC No. 58) (CC No. 65).
46. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields (RTC No. 58) (CC No. 66).
47. Whether the Draft Permit is sufficiently protective of environmental health as to prevent further degradation of water quality in receiving streams (RTC Nos. 5, 6, 9, 10, 12, 13, 14, 20, 22, 23, 26, 27, 33, 34, 35, 36, 37, 38, 39, 41, 42, 44, 45, 46, 47, 48, 50, 51, 54, 55, 56, and 58) (CC No. 3, 4, 5, 9, 12, 14, 22, 24, 25, 27, 28, 29, 35, 36, 37, 38, 39, 40, 41, 42, 45, 46, 48, 49, 50, 51, 52, 53, 62, 63, 65, 66) (Webb comment letter).
48. Whether the Draft Permit will authorize activities that may adversely affect the health and well being of Coalition members, including Ms. Casselman (RTC Nos. 12, 13, 26, 33, 38, 39, 42, 45, 51, 55, 56, and 58) (CC No. 42, 43, 46, 50, 51, 62, 63, 65, 66).

**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 Comments*. In the above section, OPIC has listed the specific City of Waco 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 by the City of Waco and does not go beyond the scope of the City of Waco's 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 technical comments by the City of Waco.

**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)<sup>6</sup> 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.<sup>7</sup> Relevant and

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<sup>6</sup> Requiring a hearing request to list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request.

<sup>7</sup> *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

material issues are those governed by the substantive law under which this permit is to be issued.<sup>8</sup>

All of these issues raise specific questions about the draft permit or the application and ultimately relate to TCEQ rules governing surface water quality or CAFOs. The TCEQ is responsible for the protection of surface water quality under Chapter 26 of the Texas Water Code.<sup>9</sup> In addition, any application for a CAFO permit must comply with Chapter 321 and 307,<sup>10</sup> 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.<sup>11</sup>

The Coalition raises several issues regarding the adequacy of retention control structures (RCS), the RCS management plan and the pollution prevention plan (PPP).<sup>12</sup> Under 30 TAC § 321.42, an applicant must implement an RCS plan<sup>13</sup> as a requirement of its individual permit.<sup>14</sup> The RCS must also comply with other technical rules designed to protect water quality.<sup>15</sup> An applicant must also complete a PPP in accordance with 30

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identify which facts are material. ... it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs.”).

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

<sup>9</sup> See Texas Water Code § 26.027(a) and § 26.003.

<sup>10</sup> 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).

<sup>11</sup> Although all issues raised by the Coalition ultimately relate to surface and ground water quality, the Coalition references protection of water quality in Issue Nos. 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 23, 24, 25, 32, 33, 34, 35, 37, 38, 41, 43, and 47 of its *Request for Hearing from Osve Dairy; TPDES Permit No. WQ0003682000 (Osve Hearing Request)*, October 5, 2009.

<sup>12</sup> *Osve Hearing Request*, Issue Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 15, 16, 17, 18, 20, 21, 22, 23, 24, and 41.

<sup>13</sup> 30 TAC § 321.42(g).

<sup>14</sup> 30 TAC § 321.42(a).

<sup>15</sup> 30 TAC § 321.31, § 321.36, § 321.37, § 321.38, § 321.39, § 321.42, and § 321.43, among others.

TAC § 321.46. Therefore all the Coalition's issues relating to the RCS, RCS management plan, and the PPP are relevant and material issues.

The Coalition has also raised issues regarding nutrients discharged from the site and the Applicant's plans to properly manage nutrients associated with the site.<sup>16</sup> TCEQ rules state there must be a site-specific nutrient management plan (NMP) for all CAFOs.<sup>17</sup> Further, nutrients are regulated under the Texas Surface Water Quality Standards<sup>18</sup> 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.<sup>19</sup> The Applicant must, at a minimum, comply with TCEQ rules governing the land application of manure, litter, or wastewater.<sup>20</sup> In addition, any application to land owned by third parties must comply with TCEQ rules governing third party land application.<sup>21</sup> Therefore, all the Coalition's issues concerning the land application of wastes generated by the facility, on and off-site, are relevant and material.

Furthermore, the Coalition's issue regarding vegetative buffers<sup>22</sup> is relevant and material. Vegetative buffers are regulated by 30 TAC §321.40(h). This was also the subject of a Notice of Violation ("NOV") entered against Osve Dairy, dated April 14, 2006, according to the TCEQ Central Registry.

Finally, issues related to soil quality, analysis and soil sampling<sup>23</sup> are relevant and material. TCEQ rules regulate soil standards<sup>24</sup> and soil testing.<sup>25</sup> Furthermore, according

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<sup>16</sup> *Osve Hearing Request*, Issue Nos. 25, 26, 30, 31, 32, 36, 37, 38, and 39.

<sup>17</sup> 30 TAC § 321.36(d), and 30 TAC § 321.40(k).

<sup>18</sup> 30 TAC, Chapter 307.

<sup>19</sup> *Osve Hearing Request*, Issue Nos. 27, 28, 29, 33, 34, 35, 37, 38, 40, 45, and 46.

<sup>20</sup> 30 TAC § 321.40.

<sup>21</sup> 30 TAC § 321.42(j).

<sup>22</sup> *Osve Hearing Request*, Issue No. 42.

<sup>23</sup> *Osve Hearing Request*, Issue Nos. 19 and 30.

<sup>24</sup> 30 TAC § 321.38(g)(1).

to the TCEQ Central Registry, there is an unresolved NOV against Osve Dairy for failure to submit copies of soil analysis results within 60 days to the ED and appropriate regional office, dated April 14, 2006.

#### **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 Applicant has used the appropriate screen separator efficiencies in its minimum treatment volume and sludge volume calculations.
2. Whether Retention Control Structure ("RCS") No. 1 and No. 2 are properly designed, and will be appropriately operated, to prevent further degradation of water quality.
3. Whether the Applicant's proposal to route all contaminated storm runoff from the open lots into RCS No. 1 does in fact satisfy TCEQ rules regarding storm water runoff containment.
4. Whether the provisions in the Draft Permit that would allow the Applicant to substantially modify RCS No. 1 and No. 2 after permit issuance by removing the berm that separates the two RCSs is sufficiently protective of water quality.
5. Whether the Applicant's estimated 20 gallons per head per day of process generated wastewater will adequately account for all wastewater generation at the facility.
6. Whether the Applicant can in fact contain stormwater runoff during the period of time after permit issuance before the Applicant is required to complete its proposed RCS enlargement.
7. 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.

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<sup>25</sup> 30 TAC § 321.36(g), § 321.46(d)(10) and (e)(1)

8. 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.
9. Whether the Applicant's proposed location of manure stockpiles will undermine water quality.
10. Whether the Draft Permit accounts for all pen areas intended for use by the Applicant.
11. Whether the Draft Permit provisions regarding the storage of slurry within RCS drainage areas are adequately protective of water quality.
12. Whether settling basins are properly designed, regulated, and certified to protect water quality.
13. 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.
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 Draft Permit requires sufficiently comprehensive settling basin certifications to be adequately protective of water quality.
17. Whether RCS No. 3 is designed, and was constructed, in a manner that renders it sufficiently protective of water quality between the time of permit issuance and the time the Applicant eventually modifies the RCS.
18. Whether the liner certification and testing requirements in the Draft Permit are sufficiently protective of water quality.
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 the Applicant is able to demonstrate that its proposed structural controls are adequately designed to properly protect against water quality degradation.
25. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality.
26. Whether the Draft Permit properly manages phosphorus production.
27. Whether the Applicant's proposed LMU's are properly sized.
28. Whether the Applicant has established proper boundaries for LMU No. 2.
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 agronomic rates are properly calculated in the NMP.
32. Whether the Draft Permit sufficiently restricts the application of phosphorus to be adequately protective of water quality.
33. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality.
34. Whether the Draft Permit provisions regarding wastewater application on third-party 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 the Applicant should be required to prepare an NMP for third-party fields.
37. Whether phosphorous crop removal rates from third-party fields are adequately regulated under the Draft Permit to prevent degradation of water quality.
38. Whether manure and wastewater application on third party fields will be properly managed and regulated to prevent degradation of water quality.

39. Whether the Draft Permit should require the NMP to address the five-year permit term as opposed to just the first year.
40. Whether the historical waste application fields should be identified in the application or the Draft Permit.
41. 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."
42. Whether the Draft Permit provides meaningful definition of vegetative buffers.
43. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards.
44. Whether the Draft Permit has been designed to adequately account for the Applicant's demonstrated lack of compliance with applicable TCEQ rules.
45. Whether the Draft Permit establishes adequate reporting requirements for third party fields.
46. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields.
47. Whether the Draft Permit is sufficiently protective of environmental health as to prevent further degradation of water quality in receiving streams.
48. Whether the Draft Permit will authorize activities that may adversely affect the health and well being of Coalition members, including Ms. Casselman.

**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

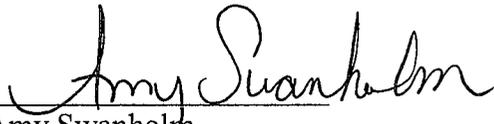
months from the first date of the preliminary hearing until the proposal for decision is issued.

### 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.

  
Amy Swanholm



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