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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

Re: In the Matter of the Application by OSVE Dairy for Permit No. WQ0003682000;
TCEQ Docket No. 2009-1634-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\ltr091109ljk
ENCLOSURE

cc: Mailing List

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2009 NOV -9 PM 3:43
CHIEF CLERKS OFFICE

MAILING LIST
FOR PERMIT NO. WQ0003682000
OSVE Dairy

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TCEQ DOCKET NO. 2009-1634-AGR

APPLICATION BY JOSEPH WILSON
OSINGA, JENNIFER SHEREE OSINGA,
BERT MARCEL VELSEN & HEIDI
VELSEN D/B/A OSVE DAIRY FOR
TPDES PERMIT NO. WQ0003682000

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BEFORE THE TEXAS COMMISSION

ON CHIEF CLERKS OFFICE

ENVIRONMENTAL QUALITY

2009 NOV -9 PM 3: 43

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

Joseph Wilson Osinga, Jennifer Sheree Osinga, Bert Marcel Velsen and Heidi Velsen / OSVE Dairy (the "Dairy" or the "Applicant") applied to the Commission on May 9, 2007 for a major amendment to Texas Pollutant Discharge Elimination System ("TPDES") Permit No. WQ0003682000 for a Concentrated Animal Feeding Operation ("CAFO") (the "Application"). The proposed major amendment would authorize the Applicant to expand its existing dairy facility (the "Facility") from 850 head to a maximum capacity of 1,600 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.¹ The Permit also

¹ Permit VII.A.2.(a).

authorizes precipitation-related runoff from land management units (“LMUs”) at the Facility where wastewater, sludge and manure are applied if such application is in accordance with Permit conditions.² The Permit otherwise prohibits the drainage of wastewater, sludge or manure from an LMU.³ 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.⁴

On October 5, 2009, the Coalition filed a timely request for hearing regarding the Permit identifying Ms. Mary W. Casselman as a Coalition member likely impacted by the regulated activities at the Facility (the “Coalition Hearing Request”). Like other Coalition members with personal justiciable interests likely adversely affected by proposed CAFO operations, Ms. Casselman qualifies as an affected person with respect to this proposed CAFO operation. As described in the Coalition Hearing Request, Ms. Casselman owns property that adjoins the Dairy property and is concerned about the likely adverse impacts from the proposed operation to her legally-protected property interests. On October 26, 2009, the ED provided his Response to Hearing Request (the “ED Response”). Unlike other adversely affected Coalition members for whom the Coalition sought a contested case hearing on other CAFO permit applications, the ED acknowledges Ms. Casselman’s affected party status and recommends that the Coalition Hearing Request be granted. However, out of 66 discrete issues raised in public comments on the Permit⁵—none of which were subsequently withdrawn—the ED recommends that a mere five

² Permit VII.A.8.(f)(2)(ii).

³ Permit VII.A.8.(f)(2)(i).

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

⁵ Summarized in 48 points in the Coalition’s October 5, 2009 request for hearing.

issues⁶ 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 by the City of Waco [that] does not go beyond the scope of Waco’s comments,”⁷ OPIC recommends that all issues raised by the Coalition in its request for hearing 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.

⁶ The ED recommends that the issues raised by the City of Waco in its public comment on the Permit as comment No. 2 (RTC No. 5), comment Nos. 3, 4, 5, 6 (RTC No. 6), comment No.32 (RTC No. 30), comment No. 41 (RTC No. 37), and comment No. 63 (RTC No. 56) be referred to SOAH.

⁷ Office of Public Interest Counsel’s Response to Request for Hearing, at 12.

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.⁸ 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 five 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 by the Coalition Hearing Request.

On December 15, 2009, the City of Waco (the "City") submitted 66 distinct concerns regarding the Permit during the public comment period. In the ED's Response to Public Comment, the ED responded to the City's comments through only 53 separate responses. In some instances the ED simply failed to acknowledge comments.⁹ 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 comments to which its response was directed. Because the ED refused to respond comment-by-comment, its response became a confusing amalgamation.

In effort to minimize further confusion while still complying with Commission rules,¹⁰ the Coalition framed its hearing request by providing summaries of disputed ED responses to the City's comments, while at the same time attempting to recapture the corresponding concerns originally raised in the City's December 15, 2008 comments. Nevertheless, the ED complains

⁸ 30 Tex. Admin. Code § 50.115(c).

⁹ See Issues No. 30, 36, and 37 of the Coalition Hearing Request.

¹⁰ *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.”¹¹ Despite the ED’s best efforts to rephrase the issues raised by the Coalition in the ED Response so that they are protected from referral to SOAH, the issues raised by the Coalition in its hearing request clearly were intended to capture the essence of the comments made during the public comment period—an effort rendered unnecessarily difficult 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. To directly address the ED’s contention, however, the Coalition believes that it has raised a sufficient number of disputed fact issues regarding the underprotective nature of the Permit that it sees no need to “bring in issues not raised during the comment period.”

Accordingly, the Coalition respectfully requests that the Commission refer each of the 48 disputed fact issues raised in its October 5, 2009 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 screen separator efficiencies are properly calculated in the storage volume calculations. (RTC No. 5) (City Comment No. 1)**
- No. 2 Whether the RCSs volume allocations and assumptions are calculated so that they meet the requirements in 30 TAC § 321.42(c). (RTC No. 6) (City Comment Nos. 3, 4, 5, and 6)**

¹¹ ED Response, p. 6.

- No. 3** 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 RCSs. (RTC No. 30) (City Comment No. 32)
- No. 4** Whether the draft permit requirements for sampling of wastewater and manure are in compliance with the CAFO requirements. (RTC No. 37) (City Comment No. 41)
- No. 5** Whether the TCEQ considered the Applicant's current ability to comply with the applicable rules before issuing the permit. (RTC No. 56) (City Comment No. 63)

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 Ms. Casselman 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.¹² Relevancy is the tendency to make more probable or less probable a material proposition.¹³ The issues cited by the Coalition all satisfy the materiality and relevancy requirement because they are each directed at the probability of material propositions, as ascertained from the applicable provisions of Chapter 26 of the Texas Water Code, and Chapters 307 and 321 of Title 30, Texas Administrative Code.

¹² *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994).

¹³ 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 issue raised by the Coalition, and therefore no legal requirement that the ED consider the merits of the Coalition's concerns. Not surprisingly, 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.”¹⁴

The mere fact that the Coalition raises a concern with the Facility that is not specifically addressed in TCEQ's regulations does not transform a disputed issue of fact into a matter of law. Texas courts have addressed the difference between disputed issues of fact and questions of law.¹⁵ An issue of fact will only be established as a matter of law if the issue is undisputed and reasonable minds could not differ as to the conclusion of the issue.¹⁶ The ED's dispute of the public comments made by the City and the issues raised in the Coalition Hearing Request is 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 set forth in TCEQ regulations or not, the issues addressed by the Coalition are disputed issues of fact that are relevant and material to the decision on the Application. Therefore, all of the issues raised in the Coalition Hearing Request are appropriate for referral to SOAH. Of the 48 disputed fact issues raised in the Coalition Hearing Request, however, there are several overarching issues that are most critical to determining whether the

¹⁴ 30 Tex. Admin. Code § 321.36(b).

¹⁵ 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.).

¹⁶ *Lehman v. Wiegat*, 917 S.W.2d 379, 382 (Tex. App.—Houston[14 Dist.] 1996, writ denied) (citing *Southwest Wheel & Mfg. Co. v. Sholts*, 501 S.W.2d 387 (Tex. App.—Beaumont 1973, writ ref'd n.r.e.)).

proposed operation will adversely impact water quality in the Bosque River watershed and whether the permittee will be able to comply 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 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).

In its public comments on the Permit, the City directly questions whether the Applicant has accurately accounted for the total volume of process-generated wastewater attributable to the proposed operations at the Facility. In its comments Nos. 9, 10, and 11, the City clearly raises concerns that the Permit will be based on unreliable volume calculations and, as a result, will not be as protective of water quality as is required by Commission rule and Chapter 26 of the Texas Water Code. This issue is important in ensuring the adequacy of the design of structural controls at the facility.

The ED summarily dismisses such concerns in comment No. 9 by responding, ironically, that it disagrees with the comment's factual contention. Because "the ED considers the Applicant's estimate acceptable," says the ED, the contrary position should not be considered. If the ED truly believes such a test is the appropriate standard for determining the existence of a disputed fact question, then it has established yet another impossible condition for affected

persons to meet in their efforts to ensure water quality is protected from illegal discharges by CAFOs like the Applicant's proposed operations. Comment No. 10 continues to challenge the reliability of the Applicant's assumptions regarding process-generated wastewater volume management. The ED purports to have addressed the concern by a revision to the Permit, but the Coalition makes clear in its hearing request that it continues to dispute the underlying rationale for the volume calculations. The ED's mischaracterization of this issue as a disputed question of law is a classic example of its efforts to avoid defending many of the basic assumptions that it routinely relies upon in its draft permits like the Permit. Similarly, comment No. 11 again challenges whether the Applicant, in fact, has the technical capability to utilize recycled effluent for freestall or milking parlor flushing. The comment suggests that the ED investigate this issue by requiring the Applicant to demonstrate that it *in fact* has such a capability, as the consequences of the Applicant's failure in this regard will have significant impacts on water quality. The ED takes an unfortunately bureaucratic position in its response to this comment: *because the rules do not require the ED to ask if the Applicant can in fact meet this technical requirement, the ED will not ask.* The Coalition makes clear in the Coalition Hearing Request that this is a live fact issue regarding the adequacy of proposed structural controls at the facility that remains very much in dispute. The disputed fact issues captured by this component of the Coalition Hearing Request should be referred to SOAH.

Issue No. 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).

Public comments Nos. 12, 13, and 28, raise key concerns regarding the Applicant's ability to accommodate a 25-year 10-day rainfall event within the first 180 days of permit issuance. Again, this issue relates to the concern regarding adequacy of structural controls. The concerns are based on the likelihood that the retention capability of the Applicant's existing

RCSs has become so undermined from sedimentation that the Applicant will not *in fact* be able to accommodate a 25-year 10-day rainfall event required by the Permit within 180 days after the Permit has been issued. The ED acknowledges that the Coalition has raised a question of fact here, but it nevertheless recommends against referring the issue to SOAH on the basis that “if the [Permit] is issued, the new 25-year 10-day volume requirements will become effective and construction is required to meet the new requirements within 180 days [of Permit issuance].” The Coalition questions whether the Applicant can meet the 25-year 10-day volume requirements within those first 180 days that it will be subject to the Permit, or whether its operations will lead to illegal discharges during that time. The ED’s circular response fails to address the issue, leaving this fact question clearly in dispute. The disputed fact issues captured by this component of the Coalition Hearing Request should be referred to SOAH.

Issue No. 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).

Here, public comments Nos. 20 and 24 question the reliability of the solids removal efficiency estimation employed by the Applicant in the Application. This issue goes to the concern as to whether or not the RCSs will be properly managed. The public comments note 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 to have not used. The result, notes the comment, is 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 disputed fact issues captured by this component of the Coalition Hearing Request should be referred to SOAH.

Issue No. 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).

Public comment No. 40, raises the issue of whether the Applicant has, or can, demonstrate that its proposed structural controls are adequate to effectively contain runoff and prevent additional discharges into the North Bosque River watershed. The clear concern captured by the comment is that the Applicant, *in fact*, cannot demonstrate the adequacy of its structural controls. The comment suggests that the ED investigate this issue before Permit issuance by requiring certain documentation from the Applicant. Unfortunately, the ED again takes a bureaucratic posture by responding that because the rules do not require it inquire about the adequacy of these controls before Permit issuance, it will not make any such inquiry.

It is the ED's prerogative to take such a myopic approach, as it has in the other instances pointed out herein. But it is entirely inappropriate for the ED to, in essence, prevent legitimate factual disputes from being explored, and ultimately resolved, because the ED disagrees with a contrary position. 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. This argument is akin to saying that a requestor would not constitute an affected person for a contested case hearing on a TPDES permit application for a Publicly Owned Treatment Works 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 mere 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 assurance that the Applicant is actually capable of accomplishing what the Permit says it must accomplish, or, more importantly, preventing what the Permit says it must prevent. Here, the ED avoids the suggestion that the competency of the Applicant's structural controls be verified *before* the Facility is authorized for operations. The ED appears satisfied with merely relying on the ink on the Permit, which says that those controls will eventually be subject to review at some point within the next five years. The Coalition is unconvinced that the Applicant's structural controls are adequately designed to effectively contain open lot runoff from the moment of Permit issuance. The Coalition believes this factual dispute warrants referral 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 comments with a categorically defensive eye, when the public comment should be accepted as an opportunity 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 public comments, and 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.

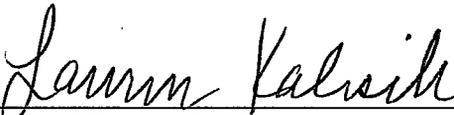
IV. PRAYER FOR RELIEF

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
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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**

1984 ——— 25 Years ——— 2009

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October 5, 2009

Ms. LaDonna Castañuela
Chief Clerk
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12100 Park 35 Circle
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VIA HAND DELIVERY

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
OCT 5 PM 1:51
CHIEF CLERKS OFFICE

Re: Request for Hearing for Osve Dairy:
TPDES Permit No. WQ0003682000 (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. WQ0003682000 (the "Draft Permit") for Joseph Osinga, Jennifer Osinga, Bert Velsen, and Heidi Velsen / Osve Dairy (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 September 3, 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 Joseph Osinga, Jennifer Osinga, Bert Velsen, and Heidi Velsen / Osve Dairy, and the Draft Permit is TPDES Permit No. WQ0003682000.

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:

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

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

Ms. Mary W. Casselman is a member of the Coalition, with property located immediately adjacent to the property boundaries of the Dairy. Ms. Casselman 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 her 209-acre property abuts the Dairy property. Because of her close proximity to the Dairy operations, she has been previously impacted by operations at this site, and is concerned about further impacts to her property by the Dairy.

Ms. Casselman uses her property both as her homestead and as an on-site residential recovery center. Ms. Casselman is concerned that odor from the proposed operation will adversely affect her clients' enjoyment of her property during their treatment. The irrigation of waste that presently occurs at the Dairy seriously affects her own use and enjoyment of her property, particularly on windy days. In addition, runoff from the Dairy has infiltrated stock tanks on her property, killing all the fish therein from nutrient overload. Ms. Casselman is concerned that the deficiencies in the Draft Permit, as described below, will result in the Dairy's continued impairment of her ability to use and enjoy her private property.

Given Ms. Casselman's history of impacts from operations at this site, she clearly meets the requirements as an affected person for an application to significantly increase such operations. Please see the enclosed map at Attachment A 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 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).
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).
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).
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).
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).
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).
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).
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).
9. Whether the Applicant's proposed location of manure stockpiles will undermine water quality (RTC No. 16).
10. Whether the Draft Permit accounts for all pen areas intended for use by the Applicant (RTC No. 16).
11. Whether the Draft Permit provisions regarding the storage of slurry within RCS drainage areas are adequately protective of water quality (RTC No. 17).
12. Whether settling basins are properly designed, regulated, and certified to protect water quality (RTC Nos. 18 and 19).
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).
14. Whether settling basin solids are properly characterized and regulated to protect water quality under the Draft Permit (RTC No. 21).

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).
16. Whether the Draft Permit requires sufficiently comprehensive settling basin certifications to be adequately protective of water quality (RTC Nos. 24).
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).
18. Whether the liner certification and testing requirements in the Draft Permit are sufficiently protective of water quality (RTC No. 27).
19. Whether RCS construction soil qualities are appropriately articulated in the Draft Permit to ensure adequate protection of water quality (RTC No. 30).
20. Whether the conditions for granting extensions to the RCS compliance schedule should be included within the Draft Permit (RTC No. 32).
21. Whether an adequate description of structural controls exists in the Draft Permit (RTC No. 33).
22. Whether the Applicant has demonstrated adequate dewatering capacity (RTC No. 34).
23. Whether monitoring, reporting, and evaluation requirements under the Draft Permit will ensure that water quality is protected (RTC No. 35).
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).
25. Whether sampling of wastewater and manure under the Draft Permit is adequate to protect water quality (RTC No. 37).
26. Whether the Draft Permit properly manages phosphorus production (RTC No. 38).
27. Whether the Applicant's proposed LMU's are properly sized (RTC No. 41).
28. Whether the Applicant has established proper boundaries for LMU No. 2 (RTC No. 42).
29. Whether the Applicant's projected crop yields for its LMUs are reasonable (RTC No. 43).
30. Whether the NMP adequately identifies soil test locations and timing (City of Waco Comment No. 48 [please note that the Executive Director provided no response to this comment]).
31. Whether agronomic rates are properly calculated in the NMP (RTC No. 44).
32. Whether the Draft Permit sufficiently restricts the application of phosphorus to be adequately protective of water quality (RTC Nos. 45 and 46).
33. Whether the Draft Permit provisions regarding waste application on noncultivated fields are adequate to protect water quality (RTC No. 47).
34. Whether the Draft Permit provisions regarding wastewater application on third-party fields are adequate to protect water quality (RTC No. 48).

35. Whether the Draft Permit provisions regarding use of third party fields are adequate to protect water quality (RTC No. 49).
36. Whether the Applicant should be required to prepare an NMP for third-party fields (City of Waco Comment No. 55 [please note that the Executive Director provided no response to this comment]).
37. Whether phosphorous crop removal rates from third-party fields are adequately regulated under the Draft Permit to prevent degradation of water quality (City of Waco Comment No. 56 [please note that the Executive Director provided no response to this comment]).
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).
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).
40. Whether the historical waste application fields should be identified in the application or the Draft Permit (RTC No. 52).
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).
42. Whether the Draft Permit provides meaningful definition of vegetative buffers (RTC No. 54).
43. Whether provisions of the Draft Permit will allow attainment of bacterial water quality standards (RTC No. 55).
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).
45. Whether the Draft Permit establishes adequate reporting requirements for third party fields (RTC No. 58).
46. Whether the Draft Permit provides adequate protection of water quality from drainage or discharge from third party fields (RTC No. 58).
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).
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).

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

Ms. LaDonna Castañuela

October 5, 2009

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Permit. If you have any questions or concerns, do not hesitate to contact me or Lauren Kalisek at (512) 322-5847.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Rochelle". The signature is fluid and cursive, with a large initial "M" and "R".

Martin C. Rochelle

MCR/ldp

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ENCLOSURES

cc: Attached Mailing List (via regular mail)

CERTIFICATE OF SERVICE

I hereby certify that on this the 5th day of October, 2009, a true and correct copy of the foregoing was sent via first-class mail, electronic mail, facsimile, or hand-delivery to the following persons:

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Image USDA Farm Service Agency

Legend

-  = Permit Applicant's Facility
-  = Coalition Member's Property

