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September 28, 2007

LaDonna Castanuela  
Office of Chief Clerk of TCEQ  
ATTN. Agenda Docket Clerk  
Mail Code 105  
TCEQ, P.O. Box 13087  
Austin, Texas 78711-3087

*Via Over night delivery*

**Re:** City of Sabinal  
TCEQ Docket No. 2007-0004-MWD

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2007 SEP 28 PM 4: 56  
CHIEF CLERKS OFFICE

Dear Ms. Castanuela:

Enclosed for filing in the above-referenced matter, please find the original and eleven copies of Requester L.T. McCann's Reply to the Responses Filed by Executive Director, Office of Public Interest Counsel and Applicant to Hearing Request and Request for Reconsideration.

Please file the original and place your file stamp on one of the copies and return to this office via the courier. Thank you for your attention to this matter.

Sincerely,

*David M. Gottfried*  
David M. Gottfried  
*by JDS*

Enclosure  
cc: Mailing List

## MAILING LIST

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TCEQ DOCKET NO. 2007-0004-MWDFOR THE APPLICANT:

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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

2007 SEP 28 PM 4:16  
CHIEF CLERKS OFFICE

**DOCKET NUMBER 2007-0004-MWD**

**Application by the**

**City of Sabinal**

**For TPDES Permit No. WQ0014689001**

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§  
§  
§  
§

**BEFORE THE**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

**REQUESTER, L.T. McCANN'S REPLY  
TO THE RESPONSES FILED BY EXECUTIVE DIRECTOR, OFFICE OF PUBLIC  
INTEREST COUNSEL AND APPLICANT TO HEARING REQUEST  
AND REQUEST FOR RECONSIDERATION**

The Requester, L.T. McCann, ("McCann") files this Reply to the Responses filed by Executive Director, Office of Public Interest Counsel and Applicant to Hearing Request and Request for Reconsideration ("Reply") relating to the application by the City of Sabinal ("Applicant") for a new Texas Pollutant Discharge Elimination System Permit No. WQ-0014689001 (the "Application"). McCann respectfully requests that the Texas Commission on Environmental Quality (the "TCEQ") reconsider the Executive Director's Preliminary Decision relating to the Application, or in the alternative, refer this matter to the State Office of Administrative Hearings for a Contested Case Hearing on the issues described herein.

**GROUND FOR RECONSIDERATION**

The Commission should remand the matter of the Application of the City of Sabinal back to the Executive Director for the following reasons:

**Failure of Notice**

1. The Application should be remanded for reconsideration based on all available information because of Applicant's failure to provide notice to McCann as required by statute. At the time of the Application, and for 6 months prior to that time, McCann was the owner of the property immediately adjacent to the effluent discharge point and currently is the owner of the

subject property. If the permit requested in the Application is granted, the result would be an unconstitutional taking of McCann's vested property rights. Therefore, the failure of Applicant to give notice as required by statute is a violation of McCann's constitutional due process rights. McCann will be prejudiced by the lack of the required notice if the issues considered by the Commission are narrowed to not include all relevant issues based on a technical reading of the statutes relating to the consideration of applications to the TCEQ. Such a result would be particularly disturbing when the Applicant is not being held to the same standard of technical compliance with statutorily required notice by mail. The ease with which the Applicant could have diligently notified McCann, the landowner most affected by the proposed wastewater treatment facility and effluent discharge, when juxtaposed against the impact of the granting of the permit mandates that this matter be remanded back to the Executive Director for reconsideration.

2. The Application contains material inaccuracies and/or fails to adequately advise the Staff of the Executive Director of the following:

- a. The nature of the tributary into which the Applicant intends to discharge effluent from the proposed wastewater treatment plant;
- b. The existence of underground fresh water springs within 800 feet of the intended effluent discharge point for the proposed wastewater treatment plant;
- c. The vested water rights of property owners on the Sabinal River within one mile downstream of the intended discharge point for the proposed wastewater treatment plant;
- d. The existence of a planned, residential subdivision, subdivided prior to the date of the Application, less than 20 feet from the intended discharge point and immediately adjacent to the proposed wastewater treatment plant;
- e. The Applicant is not the owner of the proposed site of the wastewater treatment plant and is not in negotiations with the owner of the proposed site to purchase it;

- f. The construction of the wastewater treatment plant will visually damage the property's historic integrity;
- g. The existence of the current wastewater treatment facility within 3 miles of the area to be serviced by the proposed new wastewater treatment facility.

### The Tributary

2. The tributary into which the Applicant intends to discharge effluent is a dry creek which as no flow at least 330 days per year based on the personal observations of McCann over the last 2 years. During 2006, there was no flow observed through the tributary at all. Therefore, the discharge of effluent will pond, stagnate and erode the creek. The subject tributary touches and runs upon the property owned by McCann. Discharge of effluent into the tributary will eliminate McCann's ability to keep his cattle and family safe from the effluent. Furthermore, based on the dry creek conditions of the tributary into which the Applicant intends to discharge effluent, the Application is inaccurate where it states that it does not request land disposal of effluent. See Application, page 4, para. 11. This has a direct effect on property owned by McCann because if effluent is discharged into the tributary, in addition to ponding and stagnating, some effluent is likely to spread and flow directly on to McCann's land in the flatter areas of the tributary. In addition, intermittent storm water run off into the tributary spreads the tributary to a breadth of approximately 40 feet, and will backup 20-30 feet thereby encroaching onto McCann's property. A true and correct photograph of the proposed discharge point is attached hereto as Exhibit A.

3. The characterization of the tributary as the "receiving waters" or "water body" into which the discharge is dumped is similarly misleading because it is the effluent itself that will constitute the "water body," not the intermittent run off. It is the Sabinal River, into which the undiluted effluent will run, that is used for irrigation, livestock watering, contact recreation,

fishing and domestic water for McCann. Based on the foregoing, the TCEQ should remand the Application back to the Executive Director for reconsideration.

#### **The Underground Freshwater Springs**

4. The intended discharge point of effluent from the wastewater treatment plant is within 800 feet of underground, fresh water springs which feed the Sabinal River where the Sabinal River borders property owned by McCann. McCann's water well for the consumption of his family is located less than 1000 feet from the proposed effluent discharge point. The existence of springs is expressly denied in the Application and McCann's well for human consumption was not disclosed by Applicant to the Executive Director prior to the preliminary decision to approve the Application. Based on the foregoing, the TCEQ should remand the Application back to the Executive Director for reconsideration.

#### **Vested Water Rights**

5. The intended discharge point of effluent for the wastewater treatment plant, even under the best treatment conditions, impairs and degrades McCann's vested water rights purchased with his property. The discharge also impairs and degrades the water rights of other property owners on the Sabinal River within close proximity to the proposed discharge point. Such other owners are within 1 mile downstream of the proposed effluent discharge point and were not given notice of the Application. The discharge of such effluent would result in the unconstitutional taking of McCann's vested property rights and the property rights of the other downstream owners. Based on the foregoing, the TCEQ should remand the Application back to the Executive Director for reconsideration.

### **Previously Subdivided Planned Residential Subdivision**

6. The Applicant failed to identify the existence of a previously subdivided, planned residential subdivision owned by McCann that is less than 20 feet from the proposed effluent discharge point and immediately adjacent to the propose site of the wastewater treatment plant. Such subdivision plat was filed of record in the Uvalde County Real Property Records prior to the submission date of the Application. A true and correct copy of the subdivision plat is attached hereto as Exhibit B. The City of Sabinal water services are not available to this residential subdivision and therefore its residents will rely on water wells that will be within 50 feet of the wastewater treatment plant and a few hundred feet from the proposed effluent discharge point. In the context of McCann's objections to the proposed wastewater treatment plant and discharge, this is an issue relating to McCann's use and enjoyment of his property, and not solely an issue of economic impact. Based on the foregoing, the TCEQ should remand the Application back to the Executive Director for reconsideration.

### **The City of Sabinal Does Not Own the Property**

7. The Applicant is not the owner of the proposed site of the wastewater treatment plant and is not in negotiations with the owner of the proposed site, despite its statements in the Application and its Supplement. Furthermore, the Applicant has no easements for the proposed effluent discharge line. Based on the foregoing, the TCEQ should remand the Application back to the Executive Director for reconsideration.

### **Damage to the Property's Historic Integrity**

8. The construction of the wastewater treatment plant will visually damage the property's historic integrity. The proposed wastewater treatment plant was part of the J.P. Rheiner Ranch which was originally comprised of approximately 10,000 acres. This ranch is the

birthplace of Ettie Garner, wife of Vice President John Nance Garner. Furthermore, Vice President Garner and Ettie Garner were married on the ranch. The construction of the proposed wastewater treatment plant will visually damage the property's historic integrity of an important site in Texas History. The Texas Historical Commission has expressed an interest in establishing the ranch as an historical landmark. Based on the foregoing, the TCEQ should remand the Application back to the Executive Director for reconsideration.

#### **Applicant Failed to Identify Its Existing Plant**

9. Applicant failed to identify its existing plant that is within 3 miles of the area to be serviced by the proposed new wastewater treatment facility. *See* Application, page 5, para. 1(c). Applicant has done so to hide the fact that it is not explored alternative solutions to its wastewater treatment issues that would not require the discharge of effluent into the Sabinal River, or at the very least, not discharge such effluent upstream from the City of Sabinal, just to have the effluent flow through the City itself. Based on the foregoing, the TCEQ should remand the Application back to the Executive Director for reconsideration.

#### **REQUEST FOR CONTESTED HEARING**

10. In the alternative to the foregoing Request for Reconsideration, Requester concurs with the Executive Director and the Office of Public Interest Counsel that this matter should be submitted for a Contested Case Hearing before the State Office of Administrative Hearings ("SOAH"). However, as a result of the clear failure of the Applicant to give proper notice to McCann, Requester respectfully requests that, in addition to the issues recommended by the Executive Director and OPIC for submission to SOAH, all pertinent issues be considered by SOAH, regardless of whether or not they were raised during the comment period. This would allow SOAH to determine the relevancy of all relevant issues to the consideration of the

Application, and preserve the factual record which will likely be considered by the Travis County District Court in the event of an appeal. Limiting the admission of relevant evidence at this stage of the proceedings, particularly in light of the Applicant's failure to give proper notice, would be an issue on such appeal that could be avoided by the TCEQ. Such a decision would be in furtherance of the Commission's authority to protect human health and safety, and natural resources. In this regard, McCann incorporates by reference the issues raised in paragraphs 1 through 9, above.

### **McCann Has Proper Standing**

11. Clearly, McCann is an "affected person" with a "personal justiciable interest" and clearly, McCann filed relevant and material comments during the comment period.

### **Material Issues Raised and New Issues that have Arisen**

12. Given the failure of the Applicant to provide the notice to McCann required by statute, McCann's comments during the comment period should be broadly construed. McCann has no prior experience with matters of this type and, until December 22, 2007, did not have the advice of counsel or of a qualified engineer knowledgeable in this area. As such, he was not able to identify all of the justiciable issues that could be raised in this matter with the kind of specificity suggested by Applicant in its response. Furthermore, some additional issues, such as the historical significance of the subject property, ownership of the subject property and certain inaccuracies in the Application were not identified until after the close of the comment period. Based on the foregoing, McCann's comments should be broadly construed in favor of the examination of all relevant issues to ensure the protection of human health, safety and natural resources.

13. In July 2007, McCann learned that the Texas Historical Commission has taken an interest in the subject property. Based on the foregoing, the historical value of the subject property and the impact of the proposed wastewater treatment plant and effluent discharge should be an issue submitted to SOAH for consideration.

14. The issue relating to location of the previously subdivided residential subdivision on the property adjacent to the proposed wastewater treatment plant and effluent discharge is a **use** issue and should be submitted for consideration by SOAH in the contested hearing. It is not the sale and purchase price of such properties that are the issue in this regard. Instead, it is the issue of whether such property **can be used** for its declared and intended residential purposes and whether or not human consumption water wells can safely be maintained in such close proximity to the proposed wastewater treatment plant and effluent discharge point. Based on the foregoing, the residential use issue of the immediately adjacent planned residential subdivision should be an issue submitted to SOAH for consideration.

15. Contrary to the assertions by the other parties, the issue relating to erosion of the tributary into which the Applicant proposes to discharge effluent is not only a **use** issue, it is also a **water quality issue**. The notion that erosion necessarily impacts water quality is axiomatic. By its very nature, erosion affects water quality. Furthermore, the erosion of McCann's property, including but not limited to the area adjacent to the tributary, similar to the degradation of his water rights, is also an unconstitutional taking. The impact on **use** and **water quality** relating to the erosion issue should be submitted for consideration by SOAH in the contested hearing, as well as the taking issue from the erosion of McCann's land. These important issues should be considered by SOAH based on expert testimony regarding the effects of the erosion caused by the effluent on the water quality of the Sabinal River.

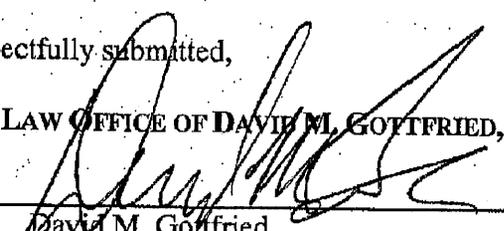
16. Applicant estimates that, based on the number of parties currently before the Commission, the issues relating to the Application could be adequately prepared for a hearing within 10 months. Furthermore, a hearing on the matter could be completed within 4 days, given current number of the parties involved and their substantial interests.

#### CONCLUSION

Applicant respectfully requests that this matter be remanded to the Executive Director for further reconsideration of his preliminary decision and examination of the issues raised herein. In the alternative, given the numerous material and relevant issues of fact that exist, McCann respectfully requests that this matter be referred to SOAH for a contested hearing on all matters raised herein.

Respectfully submitted,

THE LAW OFFICE OF DAVID M. GOTTFRIED, P.C.

By: 

David M. Gottfried

State Bar of Texas No. 08231200

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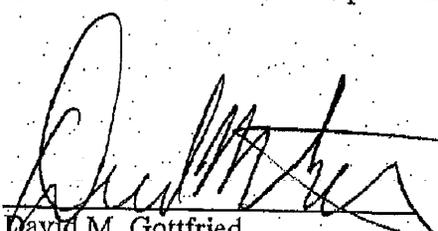
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Attorney for Requester, L.T. McCann

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing document has been served by facsimile and regular mail on September 28, 2007 to the persons on the attached mailing list:

  
David M. Gottfried

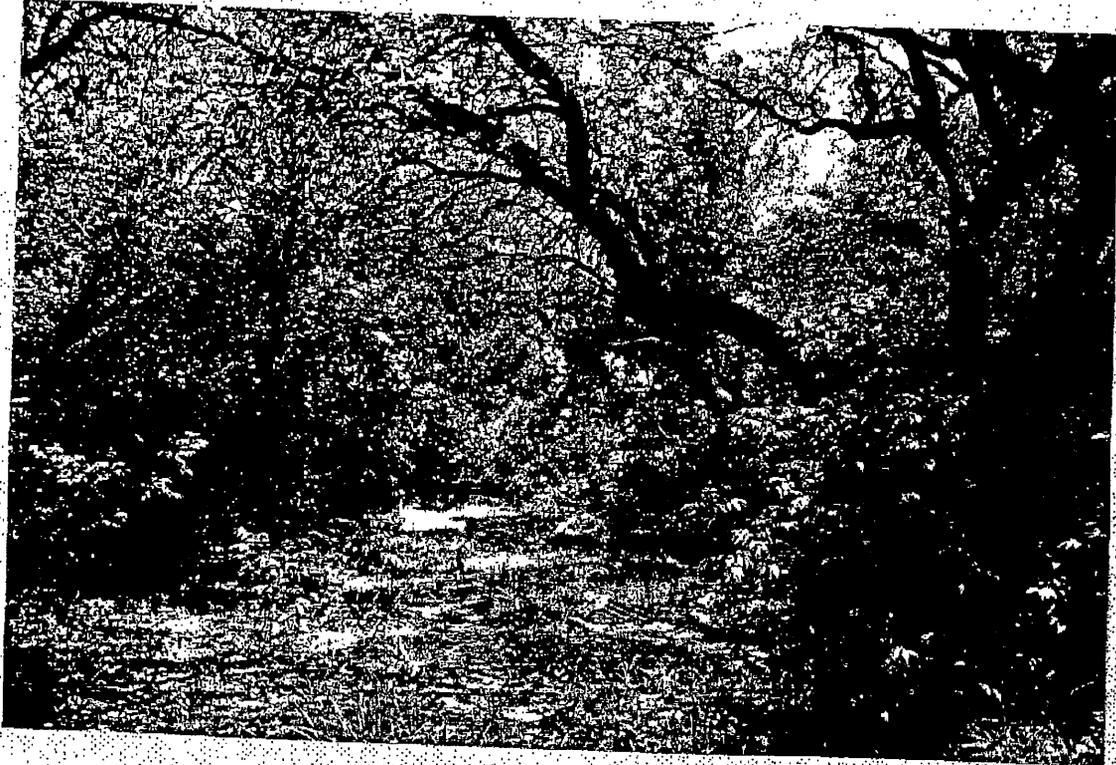


EXHIBIT  
A

tabbles

Saturday, December 25, 2004 10:43 AM

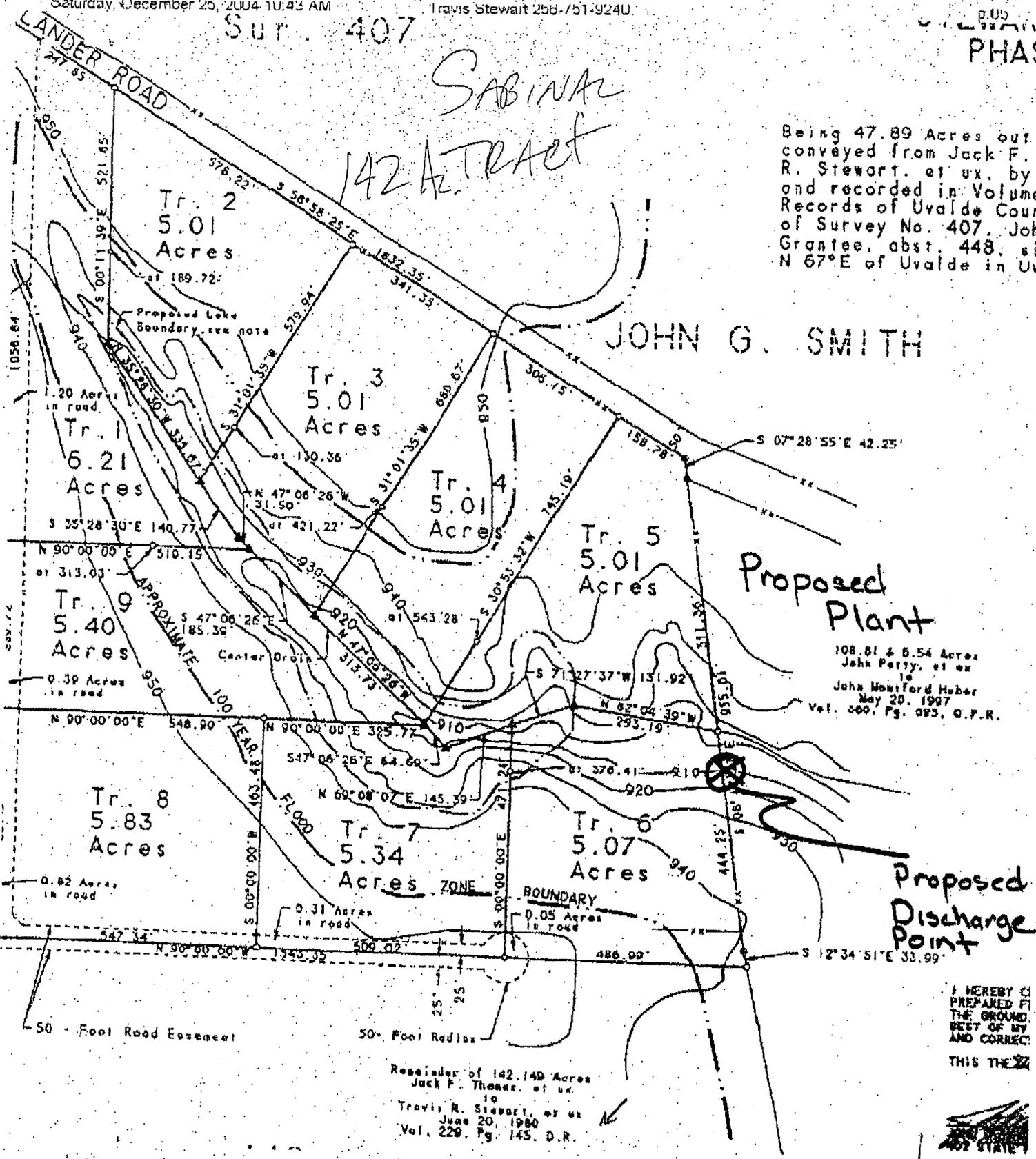
Travis Stewart 256-751-9240

SUR. 407

PHAS

SABINA  
142 ATRACT

Being 47.89 Acres out  
conveyed from Jack F.  
R. Stewart, et ux, by  
and recorded in Volume  
Records of Uvalde Coun  
of Survey No. 407, Joh  
Grantee, abst. 448, si  
N 67°E of Uvalde in Uv



JOHN G. SMITH

Proposed Plant

108.61 & 6.54 Acres  
John Petty, et ux  
John Montford Huber  
May 20, 1997  
Vol. 360, Pg. 093, O.P.R.

Proposed Discharge Point

I HEREBY  
PREPARED  
THE GROUND  
BEST OF MY  
AND CORREC  
THIS THE 22

Remainder of 142.140 Acres  
Jack F. Thomas, et ux  
Travis R. Stewart, et ux  
June 20, 1980  
Vol. 229, Pg. 145, D.R.

This is on the North End of the 142.140 Acres

EXHIBIT  
B

**THE LAW OFFICE OF  
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A Professional Corporation

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2007 SEP 28 PM 4:15  
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TEXAS  
 COMMISSION  
 ON ENVIRONMENTAL  
 QUALITY

**Fax Memorandum**

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<b>COMP:</b>		THIS IS PAGE 1 OF 12 PAGES	
<b>FROM:</b>	David Gottfried, Attorney at Law		
<b>RE:</b>	TCEQ Docket No. 2007-0004-MWD	<b>FILE:</b>	
<b>DATE:</b>	SEPTEMBER 10, 2007	IF THERE ARE PROBLEMS IN TRANSMISSION PLEASE CALL (512) 494-1481	

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