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February 1, 2008

Via Federal Express  
7904 3867 8197

Office of Chief Clerk  
Attn: Agenda Docket Clerk, Mail Code 105  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Re: Docket No. 2007-1765-MWD;  
TPDES Permit No. WQ0014725001

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 FEB - 1 PM 4: 54  
CHIEF CLERKS OFFICE

Dear Sir or Madam:

Enclosed please find the Original and 11 copies of the Koontz Bayou Old River Group ("KBOR") Reply in Support of their Request for a Contested Case Hearing and Request for Reconsideration. Please file the document and return a file stamped copy via the enclosed address envelope.

Thank you for your attention and assistance in this regard. Please do not hesitate to contact me should you have any questions.

Very truly yours,

MUNSCH HARDT KOPF & HARR, P.C.

  
Amy Rickers

AR/ta

Enclosures

TCEQ

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CC:

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<p><b><u>For Alternative Dispute Resolution:</u></b>  <b><u>Via First Class Mail</u></b>          Kyle Lucas          Texas Commission on Environmental Quality          Alternative Dispute Resolution, MC-222          P.O. Box 13087          Austin, Texas 78711-3087</p>	<p><b><u>Requesters:</u></b>  <b><u>Via First Class Mail</u></b>          Concerned Citizen          1524 Country Road 112          Caldwell, Texas 77836-6884           W.H. Giesenschlag          9201 FM 2039          Somerville, Texas 77879</p>
<p><b><u>Requesters</u></b>  <b><u>Via First Class Mail</u></b>          Camilla J. Godfrey          17302 County Road 438          Somerville, Texas 77879-4037           Burleson County Commissioners Court          Mike Sutherland, David Hilderbrand,          Frank Kristof, Vincent Svec, Jr., John Landolt,          100 W. Buck Street., Suite 306          Caldwell, Texas 77836-1724           Henry W. &amp; Lydia R. Hilton          4978 Afton Oaks Dr.          College Station, Texas 77845-7666           Charles &amp; Mary Kay Janner          1787 CR 444          Somerville, Texas 77879           Douglas R. Kettler          10409 St. Peters School Road          Brenham, Texas 77833</p>	<p><b><u>Requesters</u></b>  <b><u>Via First Class Mail</u></b>          Douglas R. Kettler          10409 St. Peters School Road          Brenham, Texas 77833           Jean &amp; Leonard Killgore          Koonz Bayou/Old River Landowners/Lessees          Group          P.O. Box 625          Somerville, Texas 77879-0625           Helen M. Landry          1518 Hartwick Road          Houston, Texas 77093-1027</p>
<p><b><u>For Koonz Bayou Old River Group:</u></b>  <b><u>Via First Class Mail</u></b>          William H. Tonn, III          6310 Dogwood Road          Brenham, Texas 77833</p>	<p><b><u>Public Official - Interest Person(s)</u></b>  <b><u>Via First Class Mail</u></b>          The Honorable Robert L. "Robby" Cook          Texas House of Representatives          P.O. Box 2910          Austin, Texas 78768-2910           The Honorable Stephen E. Ogden          Texas Senate          P.O. Box 12068          Austin, Texas 78711-2068           The Honorable Stephen E. Ogden          3740 Copperfield Drive, Suite 103          Bryan, Texas 77802-5932</p>

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**TCEQ DOCKET NO. 2007-1765-MWD**

**APPLICATION BY  
TCB RENTAL, INC. FOR A NEW  
TPDES PERMIT NO. WQ0014725001**

§ **BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

CHIEF CLERK'S OFFICE  
2008 FEB - 1 PM 4: 54  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**KOONTZ BAYOU OLD RIVER GROUP ("KBOR") REPLY IN SUPPORT OF THEIR  
REQUEST FOR A CONTESTED CASE HEARING AND REQUEST FOR  
RECONSIDERATION**

Koontz Bayou Old River Group (KBOR) herein files its Reply in Support of its Request for a Contested Case Hearing and Request for Reconsideration ("Reply"). KBOR submits this Reply to the responses of TCB Rental, Inc. ("TCB"), the Executive Director, and the Office of Public Interest Council.

CHIEF CLERK'S OFFICE  
2008 FEB 1 PM 4: 54  
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

**Introduction**

TCB filed an application for a Texas Pollutant Discharge Elimination System (TPDES) Permit ("Application") on June 29, 2006. The Texas Commission on Environmental Quality ("TCEQ" or "Commission") determined that the Application was administratively complete on July 20, 2006. The public comment period closed on May 17, 2007. Numerous citizens and public officials filed comments during the public comment period. The Executive Director issued the response to these comments on September 24, 2007. The period for requesting a contested case hearing or reconsideration closed on October 31, 2007. On October 30, 2007, KBOR filed a timely request for a contested case hearing or in the alternative a request for reconsideration, attached hereto and incorporated herein as Exhibit A.<sup>1</sup> The Executive Director, Office of Public Interest Council, and TCB filed responses to the requests for a contested case hearing and/or request for reconsideration. KBOR submits the following in reply to those responses and respectfully submits that KBOR is an

<sup>1</sup> While the filing date was October 30, 2007, the actual date of the correspondence is October 29, 2007.

"affected person" and should be granted a contested case hearing. Alternatively, KBOR requests referral to the State Office of Administrative Hearing ("SOAH") for determination of KBOR's "affected person" status. In the event that the Commission finds otherwise, KBOR would request reconsideration of the Director's decision to approve the Application or a referral of the matters stated below to SOAH as the issues are matters of public interest.<sup>2</sup>

### Hearing Request Requirements

A hearing request must designate established contact information for communications, identify the person's personal justiciable interest with a description of location in relation to proposed project and adverse affect in a manner not common to members of the general public, request a contested case hearing, list relevant and material disputed issues of fact raised during the public comment period, and provide other information specified in the public notice of the application.<sup>3</sup> KBOR substantially complied with the requirements of 30 TAC § 55.201(c) and (d) in its October 30, 2007 filing.<sup>4</sup>

To be granted a contested case hearing under 30 TAC § 55.205(a), a group or association must meet 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>2</sup> Title 30 Texas Administrative Code Section 55.27(c). References to Texas Administrative Code may appear throughout the Reply as "\_\_\_ TAC § \_\_\_."

<sup>3</sup> 30 TAC §55.201(d).

<sup>4</sup> See Executive Director's Response to Hearing Requests and Request for Reconsideration at 8. References to this document may appear as "Exec. Dir. Response at \_\_\_." See also The Office of Public Interest Counsel's Response to Hearing Requests at 5. References to this document may appear as "OPIC Response at \_\_\_."

KBOR contends that it established compliance with all of these criteria in its October 30, 2007 request for a contested case hearing. In further support of its entitlement to the contested case hearing, KBOR offers the following additional information.

#### **Group or Association**

TCB has requested clarification under 30 TAC § 55.205(b) regarding KBOR's compliance with the requirements of 30 TAC § 55.205(a). The request states that "there is not a detailed discussion specifically stating how KBOR meets those requirements."<sup>5</sup> Additionally, TCB indicates that they are confused regarding the partial listing of KBOR members in KBOR's September 25, 2006 correspondence to the TCEQ and KBOR's subsequent correspondence to TCEQ, presumably because membership has increased. The September 25, 2006 correspondence indicated that more members were expected to be added and that is exactly what has occurred. The concern of the affected persons in the area has grown and KBOR has increased in size. For clarification, at this time, KBOR consists of the following members: Upstream: Camilla J. Godfrey, Dr. and Mrs. Mark Sicilio, Mr. and Mrs. Nelley Lewis, Mimi Sicilio, William Tonn, Leonard and Jean Killgore, Henry W. and Lydia R. Hilton, William Gavranovic, Jr., Horizon Turf Farm, and Downstream: Doug Pecore, Charles and Mary Kay Janner, John Landry, Mr. and Mrs. Leon Schwartz, Avis and Earl Munson, Esther Wilson. Attached hereto as Exhibit B and incorporated herein by reference is a map showing the location of the property of many of these members. The affected person status of members, while quite evident from the concerns previously raised during the public comment period and in the October 30, 2007 KBOR filing, will be discussed below.

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<sup>5</sup> See TCB Rental, Inc.'s Response to Hearing Requests and Response to Request for Reconsideration at 10. Subsequent references to this document may appear as "TCB's Response at \_\_\_\_."

TCB argues that KBOR "was apparently formed for the sole purpose of opposing TCB's application. Therefore KBOR's group standing fails."<sup>6</sup> The mere suggestion that a group cannot organize, a constitutional right, to contest a permit application is meritless. The TCEQ rule as established in 30 TAC §55.205 (a)(2) states, "the interests the group or association seeks to protect are germane to the organization's purpose." There is no requirement that the group be formed at some time prior to the application being filed. The KBOR's stated purpose is "to protect these individuals' land for use as ranching and farming property."<sup>7</sup> The very property and use of property interests that KBOR seeks to protect are the purpose of the organization and therefore KBOR satisfies this prong of the group standing requirements.

TCB argues that the issues raised require participation of the individual members of the group. This is an incorrect conclusion because KBOR is not asking for a specific recompense for damages to each property. The group and its members are concerned with the generalized flooding of their properties. Extensive flooding impacts all of the KBOR members by damaging their property (both land and livestock) and making access to their property unavailable. Each of the group members owns or resides on property that floods due to inadequate drainage in the area. Each of them experiences this flooding because of the same drainage problems, problems that will only be exacerbated by the activities proposed at the plant. Flooding will likely contain pollutants from the plant because it cannot be adequately protected in this floodplain. These are concerns shared by all of the group members and their individual participation regarding this uniform concern is not required. Additionally, as noted in the KBOR Request, these are not concerns shared by the public generally but are specific to these landowners.

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<sup>6</sup> *Id.* at 11.

<sup>7</sup> KBOR October 29, 2007 Request for Contested Case Hearing regarding TCB Rental, Inc. TPDES Permit No. WQ0014725001 at 2. References to this document may appear as "KBOR Request at \_\_\_\_."

### Affected Person Status

The location of the proposed facility is on the "west side of Farm-to-Market Road 50, approximately 1.5 miles south of the intersection of Farm-to-market Road 50 and Farm-to-Market Road 1361 in Burleson County, Texas."<sup>8</sup> The proposed discharge is "to an unnamed drainage ditch; thence to Koontz Bayou Drain; thence to Koontz Bayou; thence to the Old River; thence to the Brazos River above Navasota River in Segment No. 1242 of the Brazos River Basin."<sup>9</sup> The KBOR property owners own or reside on property in the area surrounding the proposed project site.

The KBOR members have a legal right to use and enjoyment of their property. The KBOR members are farmers and ranchers that utilize this land for their personal enjoyment and economic benefit. Many of them are struggling at or below poverty level and this land supplies the only basis for their income. They each have a personal and economic interest in the use of their property that will be directly affected by the proposed plant. They all have a legally protected right to enjoy and use their land. The effect on this interest is reasonably related to the activity being regulated because the operation of the plant and its discharge to this drainage area will likely impact the health and safety of these property owners and the use of their property, will likely affect their use of the impacted natural resource (the water way) as a drinking source for their livestock, and will pollute their crops, pastureland, and livestock. All of these impacts are criteria to be considered in assessing the affected person status of KBOR.<sup>10</sup>

The Executive Director seems to indicate that because TCB did not list the Killgores or specified members of KBOR on their Applicant's Adjacent Landowners Map they should not be considered affected. Such a conclusion inaccurately relies on the applicant to determine if a surrounding landowner is affected. While the Executive Director does mention the Killgores'

<sup>8</sup> See TPDES Permit No. WQ0014725001.

<sup>9</sup> Id.

<sup>10</sup> 30 TAC § 55.203(c).

property 1000 feet from the proposed facility, it does not mention the fact that the Killgores also own, and must utilize, a roadway within 200 yards of the proposed facility to access their property.<sup>11</sup> Not only does the roadway flood, but the Killgores' pastureland floods when this drainage area backs up. Any reference to KBOR's assertion that the Killgores' justiciable interest arises from the fact that their property floods due to improper drainage in the man-made ditch to which the facility will discharge and that this along with the contamination likely from the inundation of the proposed plant will affect the Killgores' interests in their property is notably absent from the Executive Director's analysis.<sup>12</sup> When this information is considered, it is clear that Jean and Leonard Killgore are affected persons.

The Executive Director also states that "concerns about flooding are general concerns that are not addressed in the wastewater permitting process."<sup>13</sup> However, it is the responsibility of the Commission to ensure that the Application complies with 30 TAC § 309.13 and require protection from inundation and damage due to flooding. Therefore, these flooding concerns are of the utmost importance to the Commission. Additionally, flooding caused by, or exacerbated by, a discharge to be permitted in the wastewater permitting process should be considered. It is possible, and in fact probable, that the increase in water flow caused by the activity proposed in this Application, i.e. in the wastewater permitting process, would exacerbate flooding in this area, causing damage to property and risk to the health and welfare of area landowners and their property, and therefore, it should certainly be considered as part of this process.<sup>14</sup> KBOR is not here asking for a dam to be built or a drainage way to be cleared, it is asking that the Commission consider the fact that, in the reality that exists in this area, flooding occurs because of this drainage way. To add discharge to that

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<sup>11</sup> Exec. Dir. Response at 8.

<sup>12</sup> *Id.* at 15.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> 30 TAC § 55.203(c).

drainage way will exacerbate that flooding and potentially increase pollution to area waterways and property. That is the role of the Commission under Chapter 26,<sup>15</sup> to review the impact of the Application and to "maintain the quality of water in the state consistent with the public health and enjoyment, the propagation of terrestrial and aquatic life"<sup>16</sup> If the proposed activity can exacerbate flooding, risking the health of terrestrial life in the area and potentially causing pollution of the waterway and terrestrial life it is a concern to be addressed by the Commission.

The Executive Director further states that "their interest in the property is unlikely to be impeded by the proposed facility. The Killgores have not demonstrated a likely impact from the regulated activity on the use of their property."<sup>17</sup> KBOR submits Exhibit C, attached hereto and incorporated herein, as evidence of the impact that is likely to the Killgores and other KBOR members. The photographs and news articles in Exhibit C indicate the nature and severity of the flooding in the area. Most of these pictures and stories have previously been submitted to the Commission during the public comment period. Many of the pictures indicate the location of the proposed facility. Exhibit C is evidence that this area has been inundated by flood water at least five times in the last sixteen years. This is a substantial number of flood events. Numerous times, the property for the proposed facility has been submerged. Certainly the inability to use and enjoy their property, the inability to access their property, and the potential for their property (land and livestock) to be harmed and contaminated are interests that are impeded by the proposed facility. Additionally, the other KBOR members are individuals who own or reside on land in the vicinity of the proposed plant, at least one with property directly adjacent to the proposed project (Gavranovic).<sup>18</sup>

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<sup>15</sup> Texas Water Code Chapter 26.

<sup>16</sup> Texas Water Code § 26.003.

<sup>17</sup> Exec. Dir. Response at 9.

<sup>18</sup> See Exhibit B attached hereto.

Furthermore, the Executive director and TCB have read a qualification into the affected person criteria that does not exist. Both the Executive Director and TCB indicate that property owners must be downstream or adjacent to TCB's property to be considered affected. This qualification is not included in any definition of "affected person" in the Texas Water Code or the Texas Administrative Code. Additionally, at least one of the KBOR members is directly adjacent to TCB's property, as noted above. These individuals, many of whom submitted comments or spoke at the public hearing, have indicated that their land floods when there is a backup of this section of the Koontz Bayou and the unnamed drainage ditch. This flooding is not deterred by the fact that they may be upstream of the discharge point. This flooding is caused by the inability of this drainage system, the drainage system to which TCB wants to discharge, to handle the flow of water that is passing through in its current state. These upstream property owners will be affected by flooding that will occur from an increased flow in this drainage area. The Killgores in particular will be unable to travel to and from their home by car because their road will be underwater. This alone is enough to establish affected person status.

TCB indicates that KBOR is basing its concerns on a "fear," but these concerns are based on the reality that these landowners experience, sometimes multiple times a year. These concerns are based on factual considerations that the Applicant did not reveal to the Commission, but are documented in Exhibit C. These concerns affect the health and welfare of the KBOR members and their justiciable interest in the right to use and enjoy their property.

Much like the applicant in *United Copper Industries, Inc. v. Grissom*,<sup>19</sup> TCB is confusing the affected person standing issue with an assessment of the likelihood that KBOR will prevail on the merits. All that KBOR must prove is that one of its members may "potentially suffer harm and have

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<sup>19</sup> 17 S.W.3d 797 (2000).

[a] justiciable interest that will be affected.”<sup>20</sup> KBOR has clearly shown the effect on its members, particularly on the Killgores. The Office of Public Interest Council agreed that both KBOR and the Killgores have demonstrated affected person status.<sup>21</sup> KBOR is and should be determined to be an “affected person.”

### Issues

The Commission may refer a case to SOAH if it determines there is a disputed issue of fact, raised during the comment period, which is relevant and material to the decision on the application.<sup>22</sup> KBOR submits that there are many issues of disputed fact, as outlined below, all of which were raised during the public comment period and all of which are relevant to a decision on this Application.

As noted by the Executive Director, relevance can be defined as “applying to the matter in question.” Black’s Law Dictionary, Sixth Edition defines relevancy as:

Applicability to the issue joined. That quality of evidence which renders it properly applicable in determining the truth and falsity of the matters in issue between the parties to a suit. . . Relevancy is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being one which, if sustained, would logically influence the issue. . . Relevant evidence is such evidence as relates to, or bears directly upon, the point or fact in issue, and proves or has a tendency to prove the proposition alleged; evidence which conduces to prove a pertinent theory in a case. It does not mean evidence addressed with positive directness to the point but that which according to the common course of events either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or nonexistence of the other.

The Executive Director takes the relevancy requirement to mean that the Commission should “determine the purpose of its decision on the application . . . whether the particular application at

<sup>20</sup> *Id.* at 803. While the analysis of the *Grissom* case is under a previous iteration of the review statute, the analysis of the affected party status is instructive. Additional analysis in *Heat Energy Advanced Technology, Inc. v. West Dallas Coalition for Environmental Justice* is equally as instructive in that the potential of the applicant to emit pollutants or have an affect on the party seeking a contested case hearing was enough to establish affected person status and a determination of the sufficiency of the application to address the issue was left for a later determination. 962 S.W.2d 288, 295 (1998).

<sup>21</sup> OPIC Reply at 7.

<sup>22</sup> 30 TAC § 50.115(c).

accommodate. As TCB acknowledges, the permit, as drafted, allows for a maximum of 69 gallons per minute. This is the flow projected for a stream that does not drain properly. The maximum allowable discharge would be more than one gallon per second. Imagine turning over a gallon of milk and having it disappear in one second then do that 68 more times in a minute, that is a lot of fluid to enter a small, silted in and often blocked man-made drainage ditch. Now consider that scenario after a heavy rain when the drainage ditch is already full and there is nowhere for the water to go. This is the "fear" that the requestors are trying to bring before the Commission. Although it bears the burden of proof to establish compliance with the applicable statutes, TCB supplies no study or analysis establishing that this drainage ditch can accommodate this flow.

TCB would have the Executive Director determine if the measures established for the plant in its location in the flood plain are protective against inundation and damage.<sup>27</sup> The concern with relying on the Application for the Executive Director to make the determination regarding the safety of the plant in this area is that the Application is incomplete. In fact, the Application indicates equipment and storage tanks will be placed above flood levels but also notes that these flood levels are unknown. There has been no study done and no research completed to establish the arbitrary number of 209 feet proposed by TCB will be protective. The Executive Director and the Commission are relying on TCB to supply the necessary information to determine the level of protection warranted. Unfortunately, the Executive Director and now the Commission are not being supplied that information by TCB. There is no mention in the Application that this area is prone to flooding, no mention of the fact that the plant site is often inaccessible during those flooding periods. Furthermore, TCEQ made the following request to TCB:

4. Item 5a on page 7 of the Technical Report 1.1: The application shows that the facilities will not be located above the 100-year frequency flood level. Please provide a detailed information on the measures used to protect the facilities that include

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<sup>27</sup> TCB Response at 8.

details about the elevation of the treatment units and the elevation of the 100-year flood level. Include a site map showing the location of the treatment plant within the 100-year frequency flood plain.<sup>28</sup>

The response from TCB stated:

6. Item 5a on page 7 of the Technical Report 1.1: Please find attached sections of FIRM Maps 481169 0275 B and 481169 0225 B indicating that the plant site is in Zone A. Zone A, according to the FIRM map Legend (copy also attached) is in the "special flood hazard areas inundated by 100-year flood," but has no base flood elevations determined. The USGS map shows the elevation in the area to be 205. The WWTP will be partially buried, but it is anticipated that the top of wall will be at elevation 209 or above. All mechanical equipment will be mounted on top of the plant to avoid flood inundation as well.<sup>29</sup>

This is not a clear indication that these measures will be protective. There is no data showing that this elevation is sufficient for protection of the plant. It is the Applicant's burden to supply this information. TCB has either not completed or not supplied the information necessary to allow the Commission to analyze this issue. In a similar case, the Administrative Law Judge determined that requiring only the engineering designs, as is being done in this case, without more specificity, was insufficient to ensure protection from inundation of flood waters.<sup>30</sup> The content of Exhibit C is evidence there are concerns that are not raised, mentioned, or addressed by the Applicant. That is the very purpose of this process of requesting a contested case hearing, for affected persons and concerned citizens to raise these issues to the Commission to ensure that a full evaluation of the Application is undertaken. The mandates of Chapter 26 of the Texas Water Code and Chapter 55 and 317 of Title 30 of the Texas Administrative Code require the Commission to ensure these issues are evaluated.

<sup>28</sup> Attachment 1, Preliminary Review Comments to July 5, 2006 correspondence from TCEQ to Shelley Young, P.E. for TCB.

<sup>29</sup> July 13, 2006 correspondence from Shelley Young, P.E. to TCEQ.

<sup>30</sup> Proposal for Decision and Order on Application of the City of Weston for Domestic Wastewater Permit No. WQ 0014602001, SOAH Docket No. 582-06-2770, TCEQ Docket No. 2006-0199-MWD at 30. On January 16, 2008, the Commission decided to remand for detailed hydrologic and geologic studies and a detailed flood analysis.

The key issue raised by these property owners is that this is not just a flood plain but one that regularly floods. There are special considerations that need to be taken into account because of this flooding. These special considerations are not addressed in the Application. To read the Application one would not understand that this area floods on a repeated basis. One would not understand that the surrounding property owners may have to access their property by boat, in fact the Applicant may have to access its property by boat. There is no notice that this area is different from others and that these considerations must be taken into account. In order to provide adequate public notice, these issues need to be addressed. To say an all-weather access road will be supplied is insufficient to ensure that access will be available under all weather conditions. The Applicant must carry its burden of ensuring that it will provide sufficient protection. There is no indication in this application that the Applicant has reviewed or considered these issues. TCB tries to get around this issue by indicating that their contribution to the pollution in this area will be minor. The Commission does not employ a comparative harm analysis, but must consider whether there is adequate protection at this proposed facility to avoid pollution. There has not been a sufficient analysis to make that determination, and therefore, a hearing is warranted to ensure the issue is adequately reviewed by the Commission.

Additionally, TCB indicates in its Application that the water body was not influenced by storm water runoff during the observation.<sup>31</sup> Perhaps, in a flood plain it would be prudent to observe the area when it is subject to storm water runoff. The Application further states that there were no observed or evident uses of the water body.<sup>32</sup> However, it has become evident through the public comment period that many uses are made of this water body, including but not limited to livestock

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<sup>31</sup> Application at section 4c.

<sup>32</sup> Application at section 5.

watering and non-contact and contact recreation. Such information should indicate the need for further review of the application and the acceptability of this proposed use in the area.

To argue that "TCB should be given the opportunity to construct and operate the proposed WWTP in accordance with the Draft Permit before it is criticized for purely speculative non-compliance with same" is counterintuitive to the public hearing process. Furthermore, the concerns regarding flooding, pollution and odor may occur even if TCB complied with the terms of the permit as written. That is the concern of KBOR, the permit as written does not adequately address issues that will affect surrounding landowners and may therefore violate the statutory requirements for issuance of such a permit. The whole purpose of this process is to bring forward issues that the concerned and affected citizens realize to be issues based on their actual residence near the proposed site. It is one thing to have a generalized regulation that has to attempt to cover all scenarios but by its very nature cannot generate compliance in each and every situation. It is another to have citizens who reside in the area and own property that will be affected by the proposed Application bring forth the nuances of fact regarding the area itself and the concerns, the scenario specific concerns, that must be addressed regarding this particular Application. To be belittled with the Applicants' use of "fears" when it is the reality of these land owners' existence is inexcusable.

### Conclusion

Applicant argues the requests for contested case hearings should be denied on three bases:

1. "... issues raised in the hearing requests are legal or policy issues that are inappropriate for a contested case hearing under the Commissions' rules because they do not constitute disputed issues of fact relevant and material to the Commission's decision on the Application."<sup>33</sup>

2. "KBOR does not meet all the requirements for group or associational standing."<sup>34</sup>

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<sup>33</sup> TCB Response at 6.

<sup>34</sup> Id.

3. "... the individual hearing requestors, who may or may not be a part of KBOR, are not affected persons' with respect to the Application in light of the issues asserted."<sup>35</sup>

KBOR has sufficiently established its standing as an affected person and satisfied the criteria of 30 TAC §§ 55.201, 55.203, and 55.205. KBOR has also sufficiently established, through this document and the October 30, 2007 KBOR Request, that the issues of concern designated by KBOR are relevant and material to the Commission's decision, are disputed fact issues, and were submitted during the public comment period. All of these submitted issues are relevant to the processing of this Application. Therefore, KBOR should be granted a contested case hearing in this matter and all of the issues designated by KBOR in its October 30, 2007 filing should be referred to SOAH. Further, due to the studies that need to be completed and issues that need to be addressed KBOR requests that the Commission set the date for decision one year from preliminary hearing. Alternatively, KBOR requests that the issue of its "affected person" status be referred to SOAH for determination.

For the above reasons, the KBOR feels that the Executive Director's Decision was not a fully informed decision and should be reconsidered. Therefore, if the Commission does not grant a contested case hearing, KBOR requests, in the alternative, reconsideration of the Executive Director's Decision in this matter or referral of these public interest issues to SOAH for review.

KBOR further reserves its right to amend or supplement this request as may be required, desirable, or necessary.

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<sup>35</sup> Id.

Having established the criteria required under 30 TAC § 55.201(d) the KBOR respectfully requests that this case be referred for a contested case hearing.

Respectfully submitted,

MUNSCH HARDT KOPF & HARR, P.C.

By:



Amy Rickers

TX Bar No. 24013399

MUNSCH HARDT KOPF & HARR, P.C.

3800 Lincoln Plaza

Dallas, Texas 75201-6659

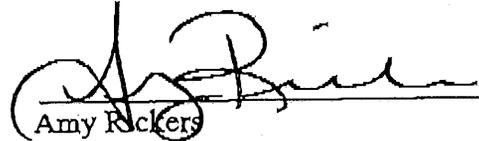
Telephone: (214) 855-7500

Facsimile: (214) 855-7584

ATTORNEY FOR KOONTZ BAYOU  
OLD RIVER GROUP

CERTIFICATE OF SERVICE

I hereby certify that on the 1<sup>st</sup> day of February, 2008, the original and 11 copies of the above Koontz Bayou Old River Group ("KBOR") Reply in Support of their Request for a Contested Case Hearing and Request for Reconsideration was filed with the Chief Clerk of the TCEQ by filing the document via overnight delivery and a copy of the document was served the same day on the Executive Director, the Public Interest Council, and the Applicant as well as a copy being mailed to each of the persons on the attached mailing list.

  
\_\_\_\_\_  
Amy Rickers

Received:

Feb 1 2008 04:52pm

08-Feb-01

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From-MUNSCH HARDT

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F-288

# Exhibit A

**MUNSCH HARDT**  
**KOPF & HARRIS P.C.**  
 ATTORNEYS & COUNSELORS  
 DALLAS | HOUSTON | AUSTIN

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Amy Rickers  
 Writer's Direct Dial: 214,880,7692  
 E-Mail: arickers@munsch.com  
 Direct Fax: 214,978,4339

October 29, 2007

Via Overnight Delivery

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

Re: **Request for a Contested Case Hearing** regarding TCB Rental, Inc. ("Applicant")  
 TPDES Permit No. WQ0014725001

Dear Ms. Castañuela:

This request for a contested case hearing on the above styled and numbered permit application is made on behalf of our client the Koontz Bayou Old River Group (KBOR). KBOR consists of approximately 26 members all of whom own or lease property in the area adjacent to and surrounding the proposed water treatment plant site. The members' properties are located anywhere from 200 yards to three miles away from the proposed plant's location. As the representative for the KBOR, I, Amy Rickers, may be reached at 3800 Lincoln Plaza, 500 N. Akard Street, Dallas, Texas 75201-6659, (214) 880-7692 or via facsimile at (214) 978-4339. All communications and documents to be received by the KBOR should be delivered to my office.

**Introduction**

Each of the members of KBOR would have standing to request a contested case hearing in their own right in that they have a justiciable interest in the permit application that is not held by the public generally. These interests will be more clearly discussed below in the recitation of disputed factual issues, however, briefly, and in summary, each of these particular individuals has a concern regarding the flooding of their property by the actions of TCB Rental, Inc. and the danger to my clients, their livestock and their property if and when that inevitable flooding occurs. These are not the interests of concern that would be held by the public at large but rather are specific to the property owners and those that occupy the property directly adjacent to or in the near proximity of the proposed plant site, the members of KBOR. Particularly, Jean and Leonard Killgore are representative members of KBOR that have such a justiciable interest and concern as their cattle ranching property will likely be flooded by the actions at the proposed plant.

EXHIBIT

A

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*October 29, 2007*  
*Page 2*

The interests of KBOR and the primary purpose of the organization is to protect these individuals' land for use as ranching and farming property and this purpose directly coincides with the position of the group and the interests they are attempting to protect in this request. As a collective unit, this group is able to assert claims and interests seeking relief that do not require the participation of the individual members.

### **Affected Person Status**

To be considered an "affected person" and therefore obtain party status in this matter, the KBOR must have a "personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 Texas Administrative Code ("TAC") §§ 55.3 and 55.103. Without limitation, and subject to revision after more facts are known, the property owners that constitute KBOR have a legal right to use and enjoyment of their property. These property owners are farmers and ranchers that utilize this land for their personal enjoyment and economic benefit. Many of these property owners are struggling at or below poverty level and this land supplies the only basis for their income. They each have an economic interest in the use of their property that will be directly affected by the proposed plant. The discharge proposed for this plant is likely to cause flooding of the neighboring properties, including those owned by KBOR members. Even slight increases in rainfall cause the creeks and drainage channels in this area to overflow. To authorize a continuous increase in the discharges to these creeks and drainage channels under the volumes under consideration ensures that flooding will occur. This flooding will not be something that the public in general will experience; rather it is something that will afflict these property owners in particular. Furthermore, this flooding from a wastewater treatment plant is likely to cause pollution and contamination to the surrounding waterways that has not been assessed in the application. This potential pollution will directly affect the KBOR members in their use and enjoyment of their property and in their ability to economically benefit from that use. The expected impacts are further discussed below.

Additionally, the skeleton criteria for consideration of affected person status are established in 30 TAC 55.203 and include, among others, the "likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person." It has become clear through the application and associated public comments that this proposed plant will adversely affect the use of the property of the surrounding property owners. This, along with their legal and economic interests, establishes the affected party status of KBOR.

### **Disputed Issues of Fact**

The Commission is in a unique position in reviewing this and every permit application. It is the responsibility of the Commission to ensure that the purpose of the permit authorization is carried out and that all necessary concerns of the public and the Texas Commission on Environmental Quality (the "Agency") are reviewed. The purpose of this particular permit review process is clear:

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*Page 3*

The purpose of this chapter is to condition issuance of a permit and/or approval of construction plans and specifications for new domestic wastewater treatment facilities or the substantial change of an existing unit on selection of a site that minimizes possible contamination of ground and surface waters; to define the characteristics that make an area unsuitable or inappropriate for a wastewater treatment facility; to minimize the possibility of exposing the public to nuisance conditions; and to prohibit the issuance of a permit for a facility to be located in an area determined to be unsuitable or inappropriate, unless the design, construction, and operational features of the facility will mitigate the unsuitable site characteristics.

30 TAC §309.10. Furthermore, "[t]he commission may not issue, amend, or renew a permit for a wastewater treatment plant if the facility does not meet the requirements of §309.13 of this title (relating to Unsuitable Site Characteristics)." 30 TAC §309.14. The public comments in this matter have certainly raised questions as to the suitability of this area for this wastewater treatment plant. These concerns should prompt the Commission to authorize a contested case hearing to ensure that sufficient information is before them to determine the suitability of this permit application and to ensure that the Applicant has sufficiently proven the statutory compliance necessary to guarantee the nuisance to surrounding property owners is minimized.

The following comments from the Decision of the Executive Director dated October 1, 2007 and the Executive Director's Response to Public Comment form the basis for this request for a contested case hearing:

#### **A. Health and Safety Concerns**

The Burleson County Commissioner Court has indicated that they are extremely concerned about the impacts of this plant:

Comment 3: The Burleson County Commissioner Court (Mike Sutherland, Frank Kristof, Vincent Svec, David Hildebrand and John Jandolt) adopted and filed a resolution recognizing the potential danger the wastewater treatment plant might pose to the health and safety of residents, landowners, livestock, native wildlife, crops, and the environment due to its location in the volatile flood plain of the Brazos River in Burleson County.

These sediments are shared by the members of KBOR. The volatility of this area increases the chances of difficulties arising in the operation of the proposed plant and its impact on the surrounding area.

The Executive Director's response to this comment indicates that "the Applicant is required to comply with the site characteristics requirements in 30 Texas Administrative Code ("TAC") § 309.13." The response goes on to indicate that "A wastewater treatment plant may not be located: (a)

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in the 100-year flood plain unless the plant unit is protected from inundation and damage that may occur during the flood event. . . The applicant is also required to comply with one of the nuisance odor control and buffer requirements of 30 TAC §309.13(e)." This type of response is common throughout the Executive Director's Response. While it may be a fact that the Applicant is required to comply with these regulations, the requirement for compliance does not ensure compliance; that is why there are enforcement measures available, because applicants do not always achieve compliance with the regulations. It is the purpose of the permit review process to do everything possible to ensure that compliance can be achieved, especially to require that applicants can demonstrate their ability to achieve compliance. It is the contention of KBOR that the Applicant has not made such a demonstration in this case.

The Executive Director further responds that effluent limitations have been established yet fails to address the fact that there is a large concern regarding the impact of flooding in addition to the pollutant content of the flood waters. Flooding of property is certainly a nuisance and would seemingly make the site unsuitable for the location of a wastewater treatment plant. Again, it is the Applicant's responsibility and burden in the permitting process to demonstrate that they can and will achieve compliance with applicable laws and regulations. This standard has not been met in this application process.

Additionally, as noted in the Technical Summary and Executive Director's Preliminary Decision in this matter, the affected segment of the Brazos River (Segment 1242) "is currently listed on the State's inventory of impaired and threatened waters." P. 2. The effect of the inevitable flooding and the carrying pollutants not necessarily expected in the discharge stream to an impaired waterway is a concern that must be addressed. The applicant has not evaluated this concern in its application and the Commission is entitled to see such an analysis before considering a permit that may have a negative impact on a waterbody and "health and safety of residents, landowners, livestock, native wildlife, crops, and the environment."

#### **B. Proposed Plant's Location is in the Floodplain**

Comment 4 establishes that the proposed plant's location is in the floodplain which experiences severe flooding. There were at least 11 commentors remarking on the severe flooding in the area. The response by the Executive Director is that the TCEQ does not prohibit placement of water treatment plant in the flood plain, but that it must be protected from inundation and damage during flood events.

There are at least two significant problems with the application in this regard. The first is that the Applicant's analysis of this area does not account for flooding. Other than the mention that the proposed plant is located in the floodplain, there is no indication that flooding is a problem in the area. In fact, the assessment of the site indicates, on page 10 of 30, that the flow fluctuations into the initial tributary are minor. The testimony at the public hearing as recited in the Executive Director's Response shows otherwise. Numerous people testified to the fact that this area floods on a recurring basis. The analysis supporting the Applicant's submittal does not recognize this fact and fails to

LaDonna Castañuela  
October 29, 2007  
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address the necessary protections for the wastewater treatment plant to be placed in an area inundated by flood waters. Furthermore, it fails to analyze the impact of an increased discharge into tributaries that flood and the resulting impact to the landowners and the property which experience the flow of those tributaries. The second problem is that the measures proposed for the plant's configuration based on the fact that it is in the floodplain are insufficient. This area admittedly is in the Special Flood Hazard Area, this is the land area covered by the floodwaters of the base flood.<sup>1</sup> The Applicant proposes to place the top of the treatment tanks at 4 feet above the listed elevation for the area. However, this area is known to flood by more than four feet, therefore, this protection is inadequate.

### C. Drainage is Already Hampered at the Proposed Discharge Point

In Comment 5 there is reference to the fact that due to silting and overgrowth the drainage in the area is severely hampered. The response by the Executive Director is that the permitting process does not allow the Commission to consider this matter but rather that the flood plain administrator should address the issue. Again, the Executive Director believes that its role is limited to controlling the discharge of pollutants into water of the state. However, pursuant to 30 TAC §309.10, the specific mandate to the Commission is to not allow this plant unless adequate protections are employed, this would include a review of the potential damage to be caused by inadequate drainage.

### D. Contamination Concerns

Comment 6 centers around the issue of potential contamination of surrounding properties during flooding. The Executive Director's Response is that the Applicant must take precautions to prevent discharges and must comply with water-quality based effluent limitations. The response goes so far as to state that "[t]he Executive Director does not have the authority to mandate a different discharge location or different type of wastewater treatment plant." While this may be true, the Executive Director and the Commission do have the authority to determine that a permit application is incomplete in its assessment of the probable impacts and necessary precautions to ensure compliance to permit it for this location. It is certainly the duty of the Executive Director to control the discharge of pollutants to waters of the state, however, in accordance with 30 TAC §309.10 it is also clearly required to ensure that there are adequate protections and no nuisance caused by the activities forming the basis of the application. The concern of an overflow from the proposed plant during flooding affecting the property, both land and livestock, is a valid justiciable interest that must be reviewed by the Commission.

Additionally, the comment addresses the fact that the overflow of water from the plant could be a trespass to adjoining landowners property and that the proposed draft permit does not authorize such a trespass. However, the Applicant has not acquired all necessary property rights to convey this water. Because this conveyance is a condition to operating under the permit and the Executive Director and Commission are being informed that it has not been met, the application should not be

<sup>1</sup> <http://www.fema.gov/plan/prevent/floodplain/nfipkeywords/sfha.shtml>; see also 44 C.F.R. §59.1.

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*October 29, 2007*  
*Page 6*

approved because the Applicant has not met their burden for ensuring compliance with the permit conditions.

#### **E. Accessibility of the Proposed Plant**

Mr. Wilkerson noted in Comment 7 that there would be times of inaccessibility of the plant due to the flooding. The response by the Executive Director is that the Applicant is required to have at least one all-weather access road. Again, the requirement does not ensure the compliance. The Applicant has not demonstrated how, in the adverse conditions of the area, they intend to ensure compliance with this requirement. Simply stating that the Applicant is required to have access does not address the fact that there is no analysis in the application that shows the Applicant will have access throughout the year. Again, the Applicant's review of the location did not take into account the flooding that occurs in the area and therefore does not account for the need for access during those floods.

#### **F. Odor Nuisance**

Odor nuisance was the subject of Comment 9. The application indicates that the buffering requirement to avoid odor nuisance will be met by the Applicant owning sufficient buffering property under 30 TAC §309.13(e). Again the Executive Director refers to the regulation requirements and states that the Applicant must comply. However, the unique nature of this proposed location with the recurring flooding of the area presents a situation in which the odor nuisance may reach further than the typical site. This abatement requirement must be considered under the unique conditions of the site to ensure that the Commission fulfills the purpose of this permitting process under 30 TAC § 309.10. Then the Executive Director refers remaining air issues to the air permitting section. The odor issue raised in Comment 9 does not deal with air permitting issues under the air permitting section, rather it focuses on the odor nuisance concerns to be addressed specifically under this permitting process.

#### **G. Increased Truck Traffic**

A concern is raised in Comment 10 regarding the increased truck traffic and inability of the roads in the area to accommodate this traffic. The response is that this is not an issue for the TCEQ to consider. Again, if these issues and concerns of the KBOR members as surrounding property owners indicate that there may be a nuisance issue or a situation that makes this site unsuitable to the proposed wastewater treatment plant then the Commission must review whether those issues have been adequately addressed in the application. The issue of increased truck traffic on roads that are seemingly not designed for such traffic has not been addressed in this application and should be reviewed by the Commission prior to considering the approval of this proposed permit.

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*October 29, 2007*  
*Page 7*

## **H. Similar Permits Denied**

The concern of Comment 12 is that the community of Clay, located in the surrounding area, had applied for a similar wastewater treatment permit and been rejected because it was in the floodplain. The Executive Director refers the commentors to the Environmental Justice section without the issue being addressed. However, that situation may be instructive here. If one wastewater treatment plant is unsuitable for this floodplain area, perhaps all are unsuitable.

## **I. Impact of Overflow Waters**

In comment 14 the concern of the impact on the supply waters for Burleson County during a flood event are raised. The Executive Director again refers to the regulations and fails to address the issue. Additionally, the Executive Director notes that there are few concerns of groundwater contamination with the discharge of treated effluent to the surface water. While that may be true in an area that does not flood on a repeated basis, the groundwater contamination concerns seem higher in this situation and should be properly reviewed. This issue is not reviewed in the application, because, again, the Applicant did not even acknowledge that this is a flood prone area.

## **Conclusion**

The public comments, many of them made by the KBOR members, establish the need for a contested case hearing. Without such a hearing, the Commission is left with insufficient information upon which to grant this permit. KBOR members are at risk of damage to their property and threats to their health and safety from the inevitable flooding that the proposed discharge will cause. The application clearly does not address the impacts of flooding on the proposed site, its operations, or the interaction of the flooding with the effect of the proposed plant on the surrounding landowners. The Applicant should be forced, at a minimum, to evaluate this impact and a proper forum to ensure that the Commission is supplied with the necessary information upon which to base its review of the permit is a contested case hearing.

In the alternative, if the Commission does not grant a contested case hearing, the KBOR would at the very least request reconsideration of the Executive Director's Decision in this matter. For the above reasons, the KBOR feels that the Executive Director's Decision was not a fully informed decision and should be reconsidered.

KBOR further reserves its right to amend or supplement this request as may be required, desirable, or necessary.

Having established the criteria required under 30 TAC § 55.201(d) the KBOR respectfully requests that this case be referred for a contested case hearing.

*LaDonna Castañuela*  
*October 29, 2007*  
*Page 8*

Respectfully submitted,

MUNSCH HARDT KOPF & HARR, P.C.



Amy Rickers

AR/ta

Received:

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From-MUNSCH HARDT

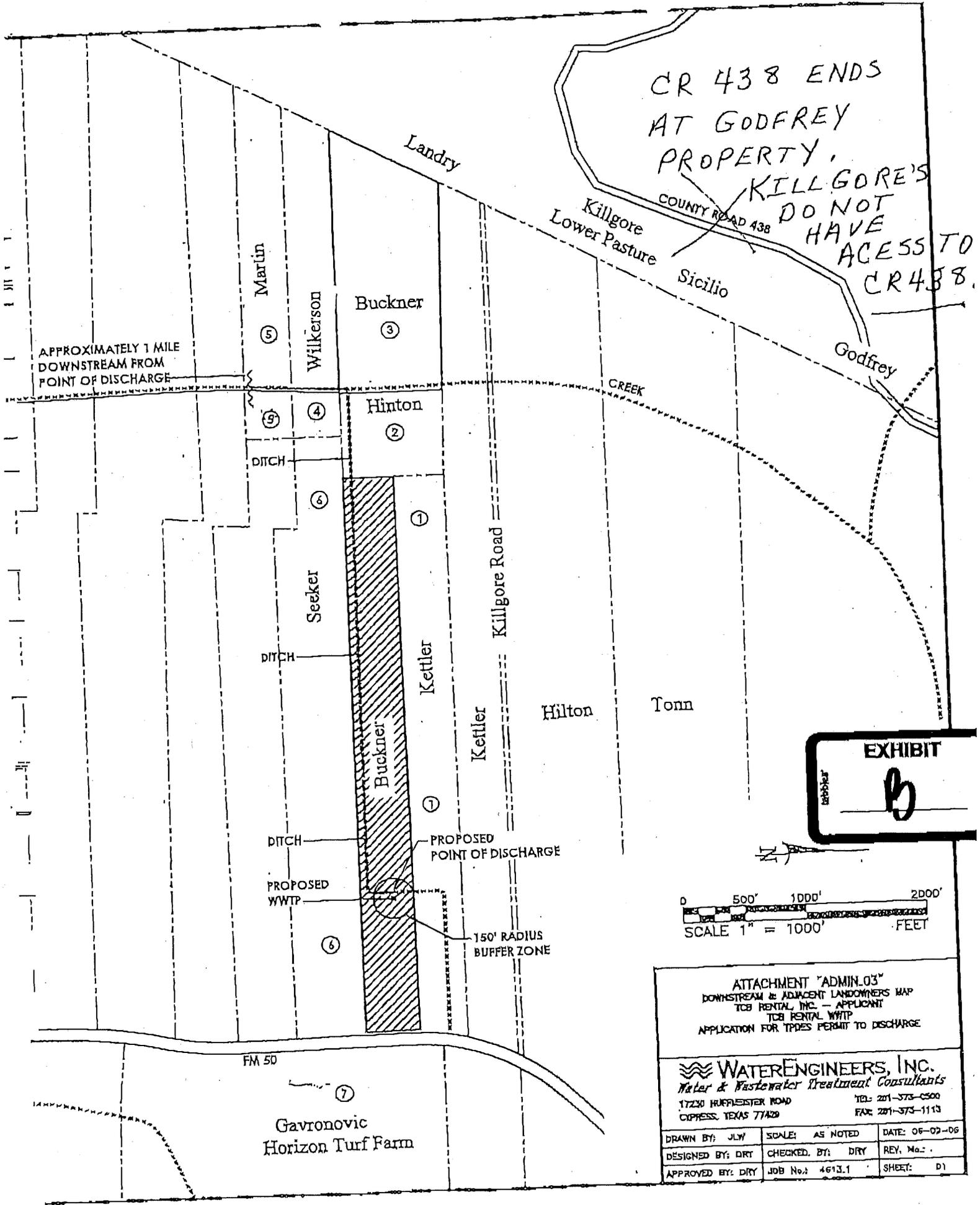
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# Exhibit B



**EXHIBIT**  
**b**



ATTACHMENT "ADMIN.03"  
 DOWNSTREAM & ADJACENT LANDOWNERS MAP  
 TCB RENTAL, INC. - APPLICANT  
 TCB RENTAL WWTP  
 APPLICATION FOR TPDES PERMIT TO DISCHARGE

**WaterEngineers, Inc.**  
 Water & Wastewater Treatment Consultants  
 17230 HUFFLESTER ROAD  
 CYPRESS, TEXAS 77429

TEL: 281-373-0500  
 FAX: 281-373-1113

DRAWN BY: JLW	SCALE: AS NOTED	DATE: 06-02-06
DESIGNED BY: DRY	CHECKED BY: DRY	REV. No.:
APPROVED BY: DRY	JOB No.: 4613.1	SHEET: D1

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# Exhibit C

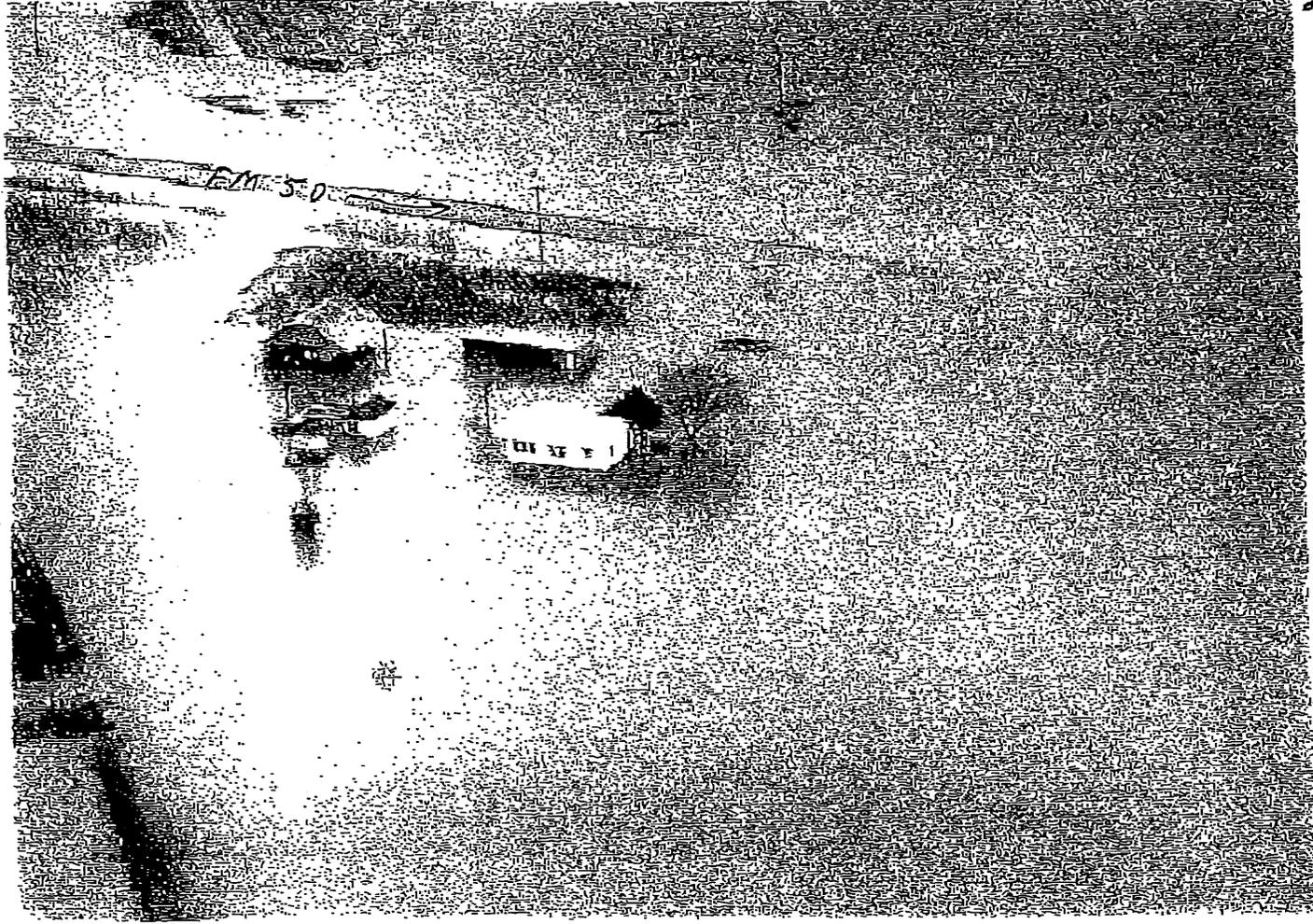
25 DEC 1991

FM 50 UNDER  
WATER AT PLANT  
SITE FOR DAYS.

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PLANT SITE IS  
1/2 MILE SOUTH  
OF THIS HOUSE  
AND CANNOT  
BE ACCESSED  
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CONDITIONS.



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EXHIBIT  
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Photo # 1 December 26, 1991

Looking east by northeast from Killgore home toward FM 50. Proposed plant site is at right side of photo underwater. FM 50, Koontz Bayou, Killgore road and the plant site were still underwater more than a week later. See newspaper articles.



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CALDWELL NEWS - SOMERVILLE TRIBUNE

# Christmas Brings Heavy Rains, Flooding To County, State - Clay Cut Off By Water

# Hospital Leads Of 19

Texas got too much of a good thing at week as torrential rains caused flooding throughout the state.

Rain began again Christmas Day and is expected to continue throughout Thursday, adding to the already overburdened waterways throughout the state.

Torrential rains which began Wednesday, December 18, and continued through Sunday, December 22, sent many rivers throughout the state out of their banks. Locally, some major highways were closed. Brazos river closed at Snook and Clay at East Ronesmish and Clay from near closed thru Sunday. On Saturday, the Brazos and other major rivers were in their banks.

Although no deaths in Burleson County have been attributed to flooding; statewide, 15 people were killed, and two remained missing. Record flooding throughout Texas contributed to the deaths, and so far, two counties, Bastrop and Travis, have been declared disaster areas by Governor Ann Richards.

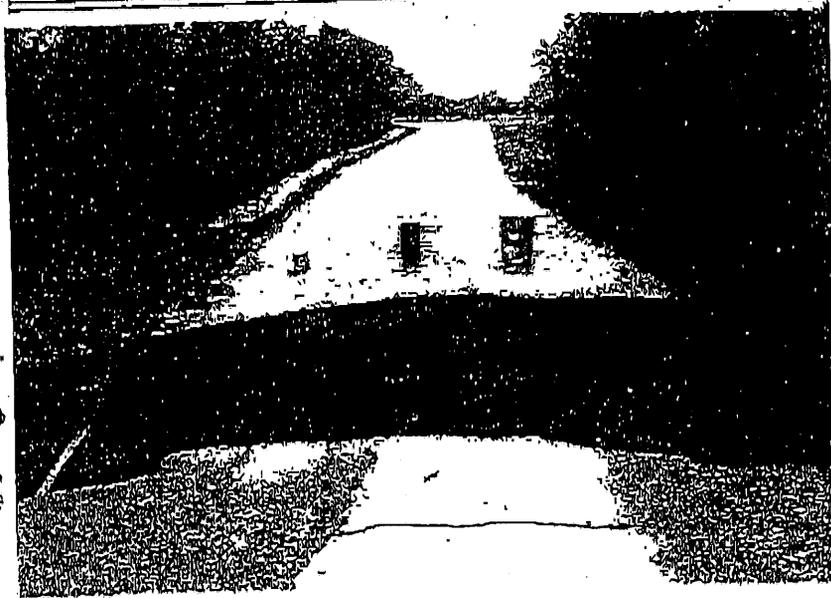
Locally, floods kept much of Burleson County isolated throughout the weekend. At least 14 roads were closed during the weekend.

County roads throughout the county experienced flooding and damage caused by swelling creeks. Two culverts along County Road 333 and 334 left residents isolated for most of Monday. One culvert was temporarily repaired with the help of local residents, but the other remained closed Thursday.

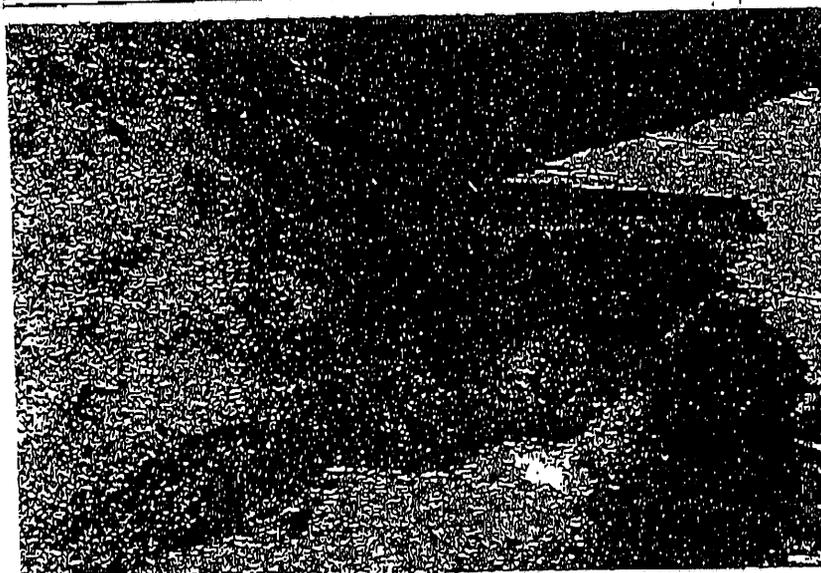
Some roads still remained closed Thursday. In Burleson County, FM 50 from Texas 21 to south of FM 60 was closed; FM 60 from Snook to the Brazos River was closed; and County Road 166 from Tunis to Snook was closed.

Somerville Lake had also cleared flood stage as of Monday. Continued rains throughout the week could add to the water problems.

Locally, several shelters have been set up for families who evacuated their



DEEP AND WIDE. Culverts on County Roads throughout the area blew out as rains swept into the county Wednesday, December 18, and didn't leave until Sunday, December 22. This culvert, located on County Road 333, blew out early Saturday, December 21, leaving residents confined to their houses. The culvert also left a gaping hole about 15 feet wide and 20 feet deep. Photo by Kay Colley



SWIRLING WATERS at the bottom of a blown out culvert run both ways Saturday, December 21. Repairs have begun on most of the damaged culverts in the area. Photo by Kay Colley

No single event had a greater impact on life in Burleson County during the re-opening of Burleson Memorial Hospital. The community enthusiastically surrounded the re-opening with \$500,000 of contributions and donations made toward the operational and viable hospital for the entire county. That goal was achieved when the hospital opened its doors on October 4, 1991, one year after it had been forced to close.

Other top stories included the death of Caldwell's first fatal airplane crash, the county's inclusion in the savings and loan crisis, the visit of the ball legend Tom Landry to the county, the appointment of a sheriff not retiring, Sheriff A.G. Wilhelm's election of the first female Sheriff of Somerville.

The effort to re-open the hospital saw the board appoint a new director, Dr. James Alexander; the passage of a \$1.5 million bond issue to re-finance the hospital's debt; the defeat of a law suit aimed at the facility closed. A myriad of public and private donations brought in \$400,000 in actual cash donations to offset potential cash flow difficulties.

In other medical news, Dr. Cochran returned from his leave of absence in October while Physician's Assistant W. Young returned to full time at Burleson Memorial Clinic.

In the political arena, the county defeated a rollback aimed at county taxes by a few pennies. The measure failed 56% to 44%.

County Commissioner Ron Urbanovsky Sheriff of the county since March 7. Urbanovsky was appointed on the recommendation of retiring Sheriff A.G. Wilhelm. The former sheriff held office for 18 years, a 19-year veteran Tom Randall mentored him.

# THE TRIBUNE

CALDWELL NEWS - SOMERVILLE TRIBUNE

VOL. 107 NO. 17 WEEKLY ONE SECTION 50¢

## County Flood Damage Will Top \$2 Million

County Judge Woods A. Caperton said Monday that the work of volunteer firefighters from around Burleson County was one of the major contributing factors to the fact that the county suffered no

drowning fatalities during heavy rains and flooding in the Brazos River valley. "I really do appreciate their work. We are grateful for what the volunteer fire department members did from Snook

and Somerville and Cooks Point, and, to a lesser extent, Caldwell. They did a tireless job manning the barricades, keeping people from entering flooded areas. Their work is one of the major reasons we

had no fatalities. We owe them a debt of gratitude. They put in a lot of hours," said Caperton.

A lot of hours have also gone into the assessment of damage from the worst

flooding in the Brazos bottom in over 35 years. The county's Flash Report, an initial assessment of damage turned in to the governor's office, reported a "low" estimate of \$2 million in damage.

ASCS official Ruth Sefcik reported that the Flash Report noted that some 30,000 acres of farm and ranch land was damaged including 2,000 acres of wheat; 4,500 acres of oats and 10,000 acres of pasture land. Over \$250,000 of hay was reported washed down the Brazos.

Also listed in the initial assessment were 20 farm homes and service buildings and well over 50 miles of barbed wire fences. The only good news from the initial reports is that the loss of livestock is believed to be minimal in the county. Originally over 150 head of cattle were believed drowned, but Sefcik said that estimate may be very high. Sefcik said a large number of cattle reported missing, more than 100 head, was found on high ground.

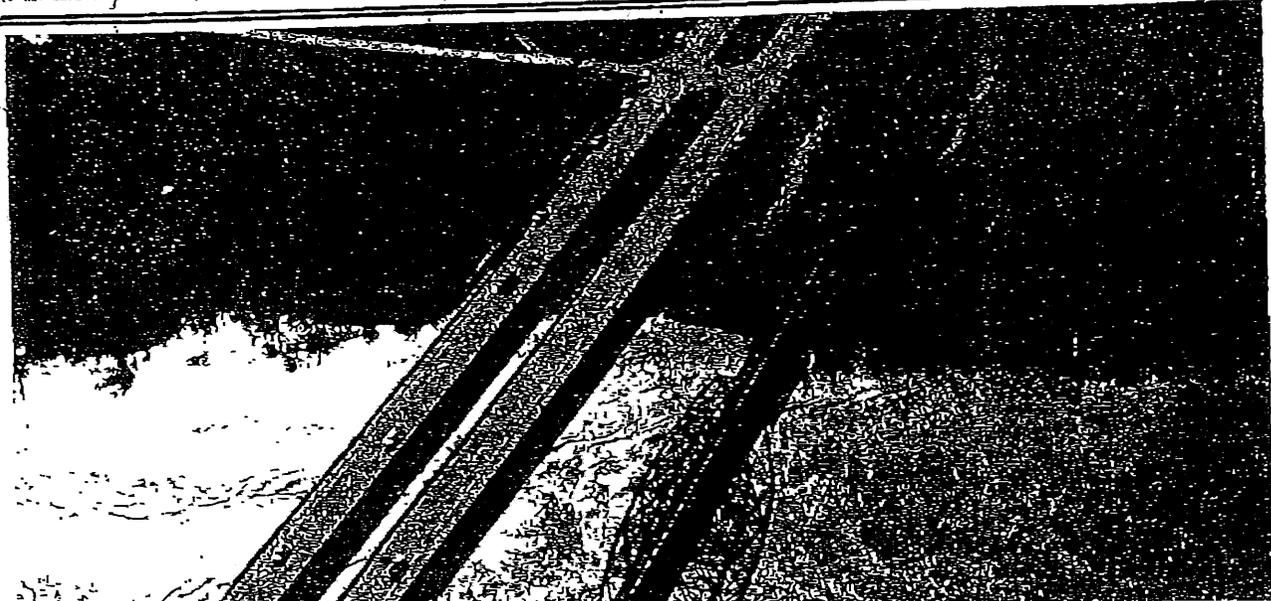
Other losses include tractors and other vehicles, irrigation motors, butane

tanks, and fertilizer and chemicals washed down stream.

Judge Caperton said that he has yet to receive a response from the governor's office on his petition to have the county declared a disaster area. He said that he expects a reply daily and is hearing from county residents about their losses.

Caperton said County Agent David Rene has worked with the ASCS on the assessment of agricultural damage, while County Emergency Management Officer Doug Beavers has looked at the losses in homes and businesses.

Many miles of county roads have been damaged along with the state highways through the bottom. Caperton said that several miles of county roads are ~~actually in need of repair and that the~~ ~~figures on these repairs are in the high~~ ~~range of \$100,000 to \$200,000.~~ The actual dollar assessment may take a while. We have received damage to roads and bridges, mainly in precincts two and four. ~~Since the state and county roads are still~~ ~~flooded, and the roads are still~~



### Flood Aid Toll Free Number Established

Photo #2 March 1993

Looking east by northeast at Killgore road out toward FM 50 with two inches of rain, before most trees leafed out. Proposed plant site right side.



08-Feb-01

16:58

From-MUNSCH HARDT

Received:

2148557584

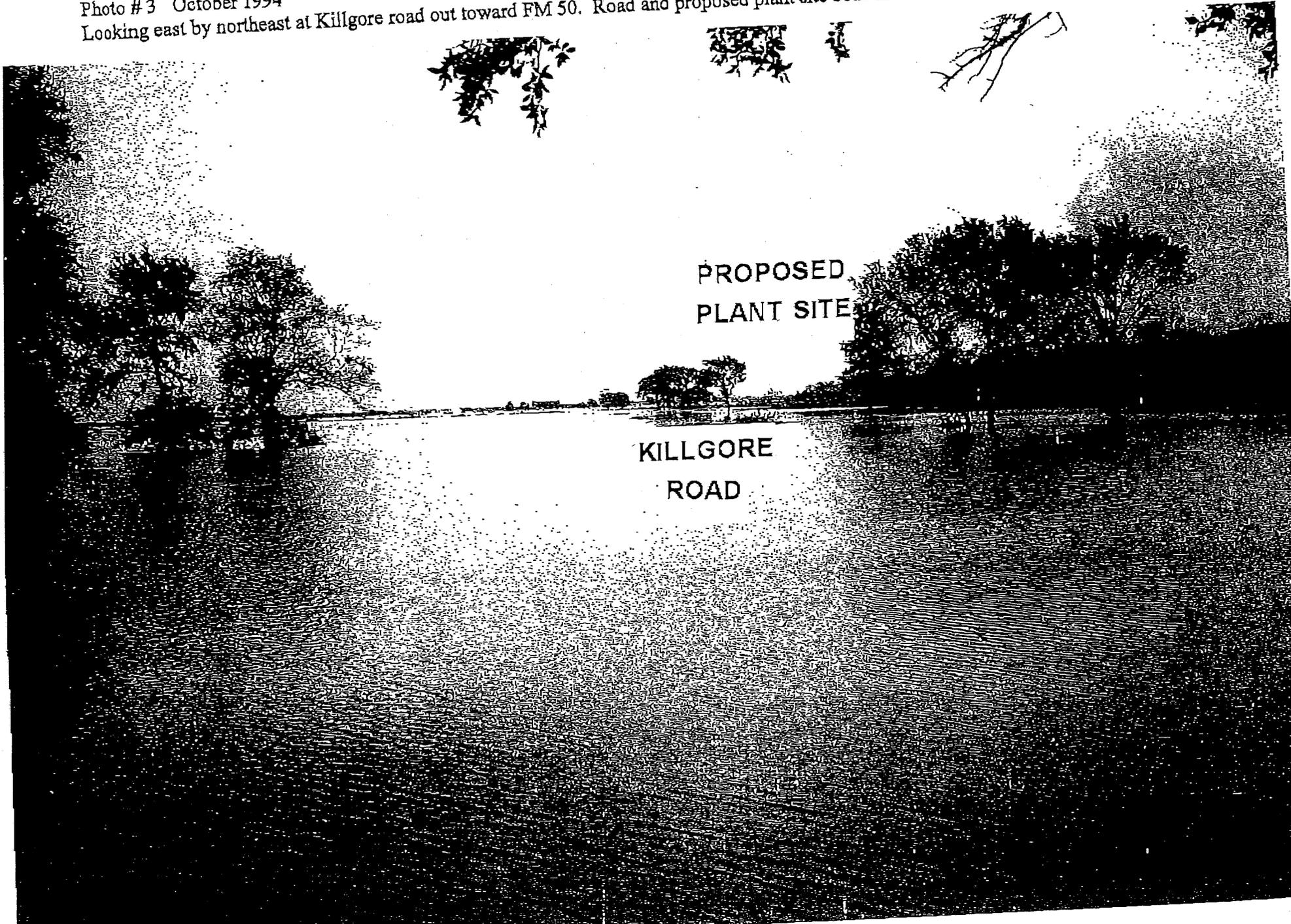
Feb 1 2008 04:55pm

T-710

P. 038/043

F-288

Photo # 3 October 1994  
Looking east by northeast at Killgore road out toward FM 50. Road and proposed plant site both underwater. See newspaper articles.



08-Feb-01 16:58 From-MUNSCHE HARDT Received:  
Feb 1 2008 04:55pm  
2148557584 T-710 P.040/043 F-288

issue meets the requirements in the applicable statutes and rules, and whether the permit should be issued as drafted or with revisions to the conditions in the permit.<sup>23</sup> The Executive Director fails to mention two options: 1) deny the permit for failure to comply with the statutory requirements, or 2) refer the application for a contested case hearing to ensure that all necessary issues regarding compliance with the statutory requirements are met. Either of these two options is a viable and reasonable choice for the Commission in this case.

KBOR reiterates its issues and concerns regarding: health and safety (Comment 3)<sup>24</sup>, the location of the plant in the flood plain (Comment 4), drainage issues (Comment 5), Contamination from flood waters inundating the proposed plant (Comment 6), accessibility of the plant (Comment 7), potential for odor nuisance (Comment 9); increased truck traffic (Comment 10), the fact that similar permits have been denied (Comment 12) and the overflow of waters (Comment 14). Each of these was addressed in KBOR's Request; discussion of each is incorporated herein by the attachment of KBOR's Request as Exhibit A hereto.

It is undisputed that each of these issues was raised during the public comment period and did not relate to a comment that had been withdrawn.<sup>25</sup> Further, the Office of Public Interest Council agrees that these are all issues of fact and are proper for referral.<sup>26</sup> Additionally, KBOR offers the following discussion of the issues for consideration:

Health and safety issues have been discussed throughout this document and those discussions are incorporated in this section and support referral to SOAH.

The amount of treated domestic wastewater that TCB refers to as "small" totals 25,000 gallons per day. This is a significant increase over the flow that the man-made drainage ditch can

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<sup>23</sup> See Exec. Dir. Response at 6.

<sup>24</sup> References to "Comment \_\_\_" are to the comments as number in the Executive Director's Response to Public Comment filed September 24, 2007.

<sup>25</sup> OPIC Response at 11, Exec. Dir. Response at 16.

<sup>26</sup> OPIC Response at 12.

# Up to 16 inches of rain produces flooding in county Somerville hardest hit by rising water in homes and businesses

Up to 16 inches of heavy rain in a 3-day period starting last weekend in Burleson County produced flooding of streets, highways and even homes and businesses as creeks ran out of their banks and the saturated ground couldn't absorb the runoff.

Somerville was hit the hardest as rising water flooded the streets and eventually into stores and houses, forcing cars off the roads.

Nearly fifty people took refuge in Dairy Queen in Somerville where they stayed the night until about 7:30 in the morning when the water in the streets had finally gone down.

Houses in low parts of Bear Creek were completely submerged in water while other houses and stores were sustaining 3-4 inches of water on the floor.

One business owner said that he and his wife spent Sunday night damming up the bottom of the doors with towels and dipping the water off the grocery store floor. "I dipped out 45 - five gallon buckets of water until late Sunday night while the water seeped through the wet towels. We decided to go home when we got the most of the water off the floor, but when we opened the store this morning we found four inches on the floor," said the Somerville store owner.

A dam at the Cade Estates Lake off of Farm Road 908, several miles west of Caldwell, broke in the early morning hours of Monday morning sending a flood of water down the roads and into fields.

The Burleson County Sheriff's Department, Caldwell and Somerville Fire and Rescue were busy rescuing people from stalled vehicles from about midnight on Sunday.

"We came across people who were stranded and standing on top of their stalled-out cars," said local law enforcement officers.

About six feet of road was washed out completely on County Road 116 leaving about a five foot drop off from the road.

One person from Somerville reported that an apartment complex in the town had 22 inches of water along with many fire ants and snakes.

Snook had their fair share of flooding over Sunday and Monday with the Justice of the Peace office having a reported three to four inches of water inside. Roads in and around the town were also closed.

Buffalo Street in Caldwell, next to Strickland Funeral Home, was reportedly washed out during the heavy rains.

Caldwell, Somerville, Snook as well as other surrounding towns canceled school Monday, but resumed on Tuesday.

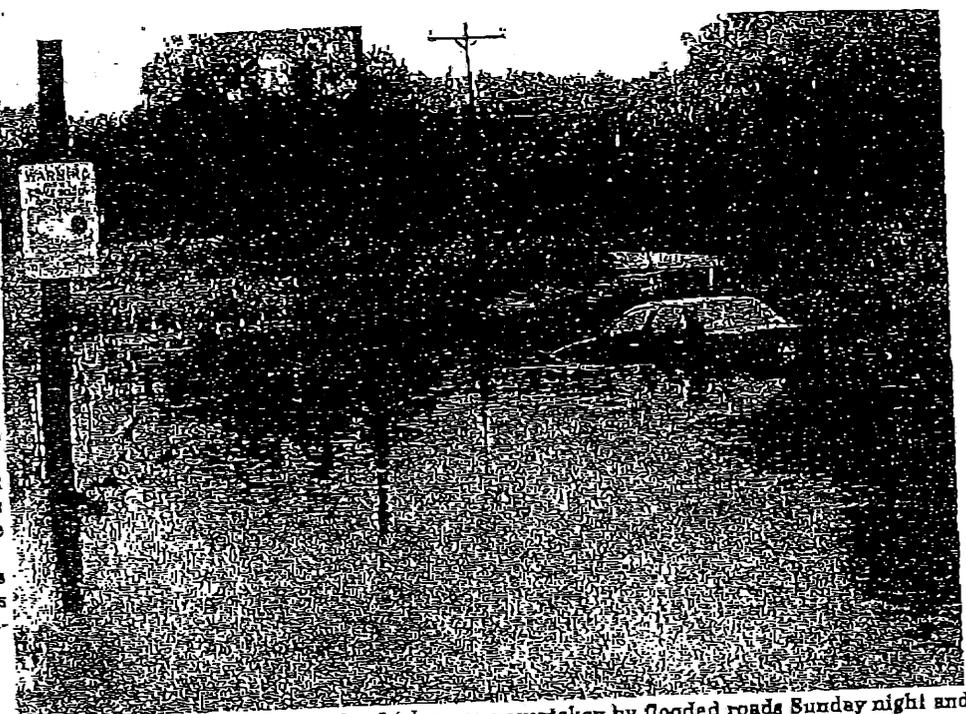
## Somerville City Council approves purchase of fire department pumper

The Somerville City Council approved the purchase of a new pumper for the volunteer fire department at the monthly meeting at the 2nd St. and Avenue J. The Tuesday, Oct. 11. It will aid in lowering insurance rates and help in fire responses said City Administrator Lloyd Behm.

The council also approved the authorization of the city administrator to prepare an ordinance to establish a "no parking zone" and a "right turn only" lane for

In other business, a resident of Somerville, Ms. Gonzales, recommended that the city put in a light board decided to stay with the current policy of installing lights at intersections in the order that was planned in the past.

The Ex-Student Association applied for a parade permit for the annual homecoming parade, which will be held at 11 a.m. Saturday, Oct. 22, starting at the Yegua Football Stadium and looping around



**STALLED VEHICLES** - Several vehicles were overtaken by flooded roads Sunday night and early Monday morning as waters rose to over five feet on roads. Stranded motorists were rescued by the Somerville Vol. Fire Department. This car stalled out on the Cade Lake Estates road several miles west of Caldwell on FM 908, when the dam on the lake broke. Up to 16 inches of rain were reported in parts of the county. - Tribune Photo by Sam Preuss

## County Commissioners Adopt \$.47 tax rate

The Burleson County Commis-

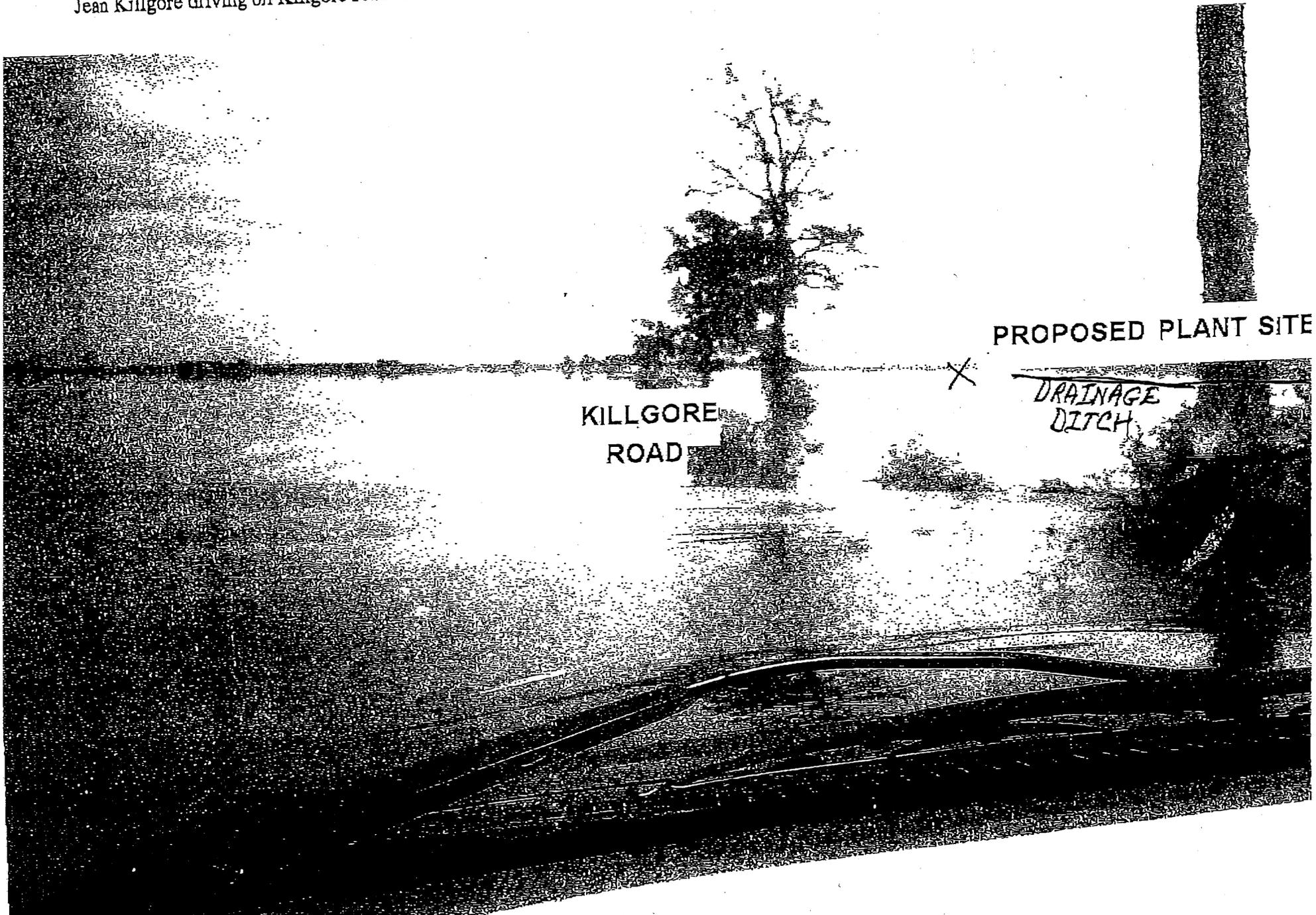
## Union Pacific Resources Co. to relocate from Deanville to Bryan

Union Pacific Resources Co. will be moving its 38 workers in Deanville and 12 employees in College Station to Bryan as early as next month, said UPRC operations superintendent Jeffrey Stahley. The major oil exploration and

900 people and operates three production offices and two gas plants in five Texas counties. It has a total of 56 rigs and earned \$309 million on revenues of \$1.3 billion in 1993. Quality communication services

Photo # 6 October 20, 2006

Jean Killgore driving on Killgore road toward FM 50 to go to the grocery store. Only three inches of rain locally that week.



08-Feb-01

17:00

From-MUNSCH HARDT

Received:

PROPOSED PLANT SITE

KILLGORE  
ROAD

DRAINAGE  
DITCH

214857584

Feb 1 2008 04:56pm

T-710

P. 042/043

F-289

Photo # 9 March 15, 2007

Aerial photo taken by Leonard Killgore looking southeast down Koontz Bayou  
Proposed plant drainage ditch and Koontz Bayou with only four inches of rain.

TCB RENTAL DRAINAGE DITCH

KILLGORE ROAD

BA YOU

KOONTZ

LOWEST  
PART OF  
BASIN

**MUNSCH HARDT  
KOPF & HARR PC**  
ATTORNEYS & COUNSELORS  
DALLAS | HOUSTON | AUSTIN

# FAX

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WEBSITE WWW.MUNSCH.COM

February 1, 2008

TELEPHONE:  
FACSIMILE: 214.855.7584

C/M#: 990007.133.

### Please deliver as soon as possible to:

Recipient	Company	Fax No.	Phone No.
1. LaDonna Castanuela	TCEQ	512-239-3311	512-239-3300
2. Phillip B. Urbany	TCEQ	512-239-4114	512-239-4542
3. Blas J. Coy, Jr.	TCEQ	512-239-6377	512-239-6363
4. Paul M. Terrill, III	The Terrill Firm, PC	512-474-9888	512-474-9100
5. Chris Ekoh	TCEQ	512-239-0606	512-239-0600

**From:** Tish Avila, secretary to Amy Rickers

**Phone #:** (214) 880-7651

**Total number of pages (including this cover sheet):** 43

**Hard Copy of Document to Follow:** No

**Special Message:**

TCB Rental, Inc.

Docket No. 2007-1765-MWD; Permit No. WQ0014725001

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2008 FEB - 1 PM 4:53  
CHIEF CLERKS OFFICE

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