

Bryan W. Shaw, Ph.D., *Chairman*  
Buddy Garcia, *Commissioner*  
Carlos Rubinstein, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**  
*Protecting Texas by Reducing and Preventing Pollution*

April 5, 2010

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

**RE: CITY OF BULLARD**  
**TCEQ DOCKET NO. 2010-0237-MWD**

Dear Ms. Castañuela:

Enclosed for filing is the Office of Public Interest Counsel's Response to Requests for Hearing in the above-entitled matter.

Sincerely,

*James B. Murphy*  
James B. Murphy, Attorney *br jlb*  
Assistant Public Interest Counsel

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 P.O. BOX 13087 AUSTIN, TEXAS 78711-3087 512-239-6363

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**TCEQ DOCKET NO. 2010-0237-MWD**

<b>IN THE MATTER</b>	<b>§</b>	<b>BEFORE THE</b>
<b>OF THE APPLICATION OF THE</b>	<b>§</b>	
<b>CITY OF BULLARD FOR</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>TPDES PERMIT</b>	<b>§</b>	
<b>NO. WQ0011787001</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE  
TO REQUESTS FOR HEARING**

TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on  
Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in  
the above-referenced matter and respectfully shows the following.

**I. INTRODUCTION**

**A. Background of Facility**

The City of Bullard (Applicant or City) has applied to the TCEQ for a major amendment to TPDES Permit No. WQ0011787001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 213,000 gallons per day (gpd) to a daily average flow not to exceed 438,000 gpd for a wastewater treatment facility serving the City. The facility is located approximately 2,600 feet southwest of the Bullard School and approximately 3,000 feet west-southwest of the intersection of Farm-to-Market Road 344 and Oak Street in Bullard, Cherokee County.

The treated effluent is discharged to an unnamed tributary, thence to Flat Creek, thence to the Neches River below Lake Palestine in Segment No. 0604 of the Neches River Basin. The unclassified receiving water uses are no significant aquatic life use for the unnamed tributary and

high aquatic life use for Flat Creek. The designated uses for Segment No. 0604 are high aquatic life use, public water supply, and contact recreation. Segment No. 0604 is currently listed on the State's inventory of impaired and threatened waters for lead from State Highway 21 to US 84. Because the facility does not receive significant industrial wastewater contributions, the TCEQ does not anticipate the effluent from this facility will contribute to the impairment of this segment for lead.

## **B. Procedural Background**

TCEQ received this application on April 22, 2009. On June 3, 2009, the Executive Director (ED) declared the application administratively complete. The ED issued the Notice of Receipt and Intent to Obtain a Water Quality Permit Amendment (NORI) on June 24, 2009,<sup>1</sup> and the Applicant caused it to be published on July 1, 2009 in the *Tyler Morning Telegraph* and the *Jacksonville Daily Progress*. The ED completed the technical review of the application, and prepared a draft permit. The ED issued the Notice of Application and Preliminary Decision for a Water Quality Permit Amendment (NAPD) on September 30, 2009, and the Applicant caused it to be published on October 14, 2009 in the *Jacksonville Daily Progress*. The public comment period ended on November 13, 2009. On January 11, 2010, the ED filed its decision and Response to Comments, which the Chief Clerk's office mailed on January 12, 2010. The deadline to request a contested case hearing was February 11, 2010.

TCEQ received timely comments and requests for a contested case hearing from Scott Rhodes with the law firm of McGinnis, Lochridge & Kilgore, LLP on behalf of HRC Cherokee Farm, LP (HRC) on October 29, 2009 and February 9, 2010 and from Richard Lowerre with the

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<sup>1</sup> Note that the NORI published by the Applicant on July 1, 2009 is styled "Amended Notice of Receipt of Application and Intent to Obtain a Water Quality Permit Amendment" because the amended notice changed the location where the application was available for viewing and copying. The TCEQ mailed the original NORI to Applicant on June 15, 2009, but issued the amended notice prior to Applicant publishing the original.

law firm of Lowerre, Frederick, Perales, Allmon & Rockwell on behalf of the Texas Conservation Alliance (TCA) and Dr. Adrian Van Dellen on October 27, 2009 and February 11, 2010. OPIC recommends denying the hearing requests.

## II. APPLICABLE LAW

This application was declared administratively complete on April 22, 2009. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TEX. ADMIN. CODE (TAC) § 55.201(d).

An "affected person" is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. *Id.* Governmental entities with authority under state law over issues contemplated by the

application may be considered affected persons. 30 TAC § 55.203(b). Relevant factors considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

A group or association may request a contested case hearing if:

- (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.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. 30 TAC § 55.205(b).

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;

- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

### III. DISCUSSION

#### A. Determination of Affected Person Status

##### 1. HRC Cherokee Farms, LP

HRC Cherokee Farms, LP (HRC) timely filed requests for a contested case hearing.

According to the request, HRC is located approximately 2.9 miles downstream of the discharge point, and owns approximately 7,000 acres of land in Cherokee County. HRC also holds Water Use Permit No. 12047, which permits HRC to construct and maintain two reservoirs on Flat Creek to be used for recreational purposes. Both reservoirs will be downstream of the discharge point, with the northernmost lake approximately 3.1 miles downstream. HRC also has four groundwater wells on its property that are used for irrigation and maintenance of lake levels.

HRC expresses concern about adverse effects on public health and safety and use and enjoyment of its property. Specifically, HRC is concerned about degradation of water quality in Flat Creek, particularly during low flow or intermittent flow conditions. Concerns expressed include algal blooms, dissolved oxygen levels, pharmaceutical contaminants, and adverse effects on aquatic life habitat, drinking water supply, groundwater, and aesthetics. HRC questions the modeling used to support the draft permit amendment. HRC also expresses concern about Applicant's compliance history and financial, managerial, and operational capacity to operate the

facility in compliance with state requirements. HRC also questions whether the facility complies with the TCEQ's regionalization policy.

Based on the location of HRC in relation to Applicant's facility and the size of the permitted flow for Applicant's facility, HRC does not appear to be an affected person. HRC is located approximately 2.9 miles downstream of the discharge point, and its nearest reservoir is located approximately 3.1 miles downstream. The permit amendment authorizes a relatively small increase in permitted flow of 225,000 gpd. Because of the distance of the facility from HRC and the size of flow, it does not appear there is a likely impact on HRC's use of property or nearby natural resources. Based on the factors in 30 TAC § 55.203(c), OPIC concludes HRC is not an affected person.

## 2. Dr. Adrian Van Dellen

Dr. Adrian Van Dellen timely filed a request for a contested case hearing. He has worked as a professional guide and photographer, and has used Flat Creek and the Neches River for these activities. He has taken canoe and kayak trips on Flat Creek and the unnamed tributary that is the initial receiving waters for the discharge. He has paddled a canoe for recreational purposes up Flat Creek to where CR 3707 crosses it, which is approximately 0.2 mile upstream from where the unnamed tributary enters Flat Creek.

Dr. Van Dellen expresses numerous concerns about the facility and permit amendment, and also incorporates the concerns of HRC in his hearing request. He expresses concern about Applicant's compliance history and the adequacy of the application, public notice, and the terms of the draft permit. He is concerned the discharge will result in violations of water quality standards and adversely affect wetlands. He is also concerned the facility will cause nuisance conditions and violate the TCEQ's regionalization policy.

Based on the area where Dr. Van Dellen recreates on Flat Creek and the Neches River in relation to Applicant's facility and the size of the permitted flow for Applicant's facility, it does not appear Dr. Van Dellen is an affected person. The permit amendment authorizes a relatively small increase in permitted flow of 225,000 gpd. In his hearing request, Dr. Van Dellen states that the furthest upstream that he recreates is the intersection of CR 3707 and Flat Creek. Based on the map prepared by the ED for this hearing request, it appears the intersection of CR 3707 and Flat Creek occurs several miles downstream of the discharge point. *See* City of Bullard, WQ0011787001, Map Requested by TCEQ Office of Legal Services for Commissioners' Agenda, February 8, 2010 (ED's Map) (attached as Exhibit A). Although Dr. Van Dellen's professional interest in recreation may be sufficient to establish affected person status, he does not appear to recreate near the proposed facility. Because of the distance of the facility from where Dr. Van Dellen recreates and the size of flow, it does not appear there is a likely impact on his use of nearby natural resources. Based on the factors in 30 TAC § 55.203(c), OPIC concludes Dr. Van Dellen is not an affected person.

Because the hearing request is not specific as to the location where Dr. Van Dellen recreates in relation to the facility, OPIC invites him to submit a reply by April 19, 2010 clarifying where he recreates in relation to the facility. OPIC may reconsider its conclusion based on a timely filed reply.

### 3. Texas Conservation Alliance

The Texas Conservation Alliance (TCA) timely filed a request for a contested case hearing. TCA is a non-profit corporation with goals that include protection of the water resources of the state and representation of its members in state proceedings that affect the natural resources used by its members. TCA is a membership organization with individual

members and member organizations. In its hearing request, TCA states that it has members who will be affected by the proposed amendment. TCA relies on Dr. Van Dellen as its affected member, and expresses the same concerns with the proposed permit amendment as Dr. Van Dellen.

Based on the conclusion reached above that Dr. Van Dellen is not an affected person, TCA is not affected. The associational standing requirements in 30 TAC § 55.205(a)(1) state that one or more members of the association must be affected in his or her own right. Because Dr. Van Dellen does not appear to be affected, TCA has not established affected person status. As indicated above, however, OPIC may reconsider its conclusion based on a timely filed reply.

#### **B. Issues Raised in the Hearing Request**

HRC has raised the following issues in its hearing requests:

1. Whether the proposed discharge, including pharmaceutical and other potentially dangerous contaminants, will violate water quality standards.
2. Whether the proposed discharge, including pharmaceutical and other potentially dangerous contaminants, will adversely affect health and safety.
3. Whether the proposed discharge, including pharmaceutical and other potentially dangerous contaminants, will adversely affect aquatic life.
4. Whether the proposed discharge, including pharmaceutical and other potentially dangerous contaminants, will adversely affect use and enjoyment of property including HRC's reservoirs and groundwater wells.
5. Whether Applicant's compliance history requires additional permit conditions to ensure compliance with applicable regulatory requirements.
6. Whether the facility violates the Commission's regionalization policy.

In addition to incorporating by reference the issues presented by HRC, Dr. Van Dellen and TCA have raised the following issues in their hearing requests:

1. Whether Applicant's compliance history requires denial of the permit or additional permit conditions to ensure compliance with applicable regulatory requirements.

2. Whether the application meets the requirements of the Texas Water Code and Commission rules.
3. Whether Applicant provided public notice of the application in accordance with the Texas Water Code and Commission rules.
4. Whether the draft permit provides enforceable terms on the character of the discharge, flow limitations, and monitoring and reporting.
5. Whether the proposed discharge will violate water quality standards or degrade water quality in the receiving waters, including Flat Creek and the Neches River.
6. Whether the facility will cause nuisance conditions.
7. Whether the facility violates the Commission's regionalization policy.
8. Whether the facility or proposed discharge will adversely affect wetlands.

**C. Issues Raised in the Comment Period**

All of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

**D. Disputed Issues**

There is no agreement between the hearing requesters and the ED on the issues raised in the hearing requests.

**E. Issues of Fact**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A). All of the issues presented are issues of fact appropriate for referral to SOAH.

**F. Relevant and Material Issues**

The hearing requests raise issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). In order to refer an

issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–251 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material . . . it is the substantive law’s identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309, as well as under specific rules related to wastewater systems found at 30 TAC Chapters 30 and 217. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment.” 30 TAC § 307.1. Furthermore, the proposed permit must comply with 30 TAC §§ 305.122(c), 307.1 and 309.10, which prohibit injury to private property and invasion of property rights and require minimization of exposure to nuisance conditions. In addition, Applicant is required to control and abate nuisance odor under 30 TAC §§ 307.4(b)(1) and 309.13(e). The Commission also encourages the development of regional systems for wastewater collection. 30 TAC § 307.1.

All of the issues presented by the hearing requesters are relevant and material to the Commission's decision on this application, except for issues related to noise, light, and dust caused by the proposed facility. Noise, light, and dust are outside the scope of the Commission's review for a wastewater treatment facility.

**G. Issues Recommended for Referral**

OPIC concludes HRC is not an affected person. If the Commission determines HRC is an affected person, OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether the proposed discharge, including pharmaceutical and other potentially dangerous contaminants, will violate water quality standards.
2. Whether the proposed discharge, including pharmaceutical and other potentially dangerous contaminants, will adversely affect health and safety.
3. Whether the proposed discharge, including pharmaceutical and other potentially dangerous contaminants, will adversely affect aquatic life.
4. Whether the proposed discharge, including pharmaceutical and other potentially dangerous contaminants, will adversely affect use and enjoyment of property including HRC's reservoirs and groundwater wells.
5. Whether Applicant's compliance history requires additional permit conditions to ensure compliance with applicable regulatory requirements.
6. Whether the facility violates the Commission's regionalization policy.

OPIC concludes Dr. Van Dellen and TCA are not affected persons. If the Commission determines Dr. Van Dellen and TCA are affected persons, or if the Commission determines all the hearing requesters are affected, OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

1. Whether Applicant's compliance history requires denial of the permit or additional permit conditions to ensure compliance with applicable regulatory requirements.
2. Whether the application meets the requirements of the Texas Water Code and Commission rules.
3. Whether Applicant provided public notice of the application in accordance with the Texas Water Code and Commission rules.
4. Whether the draft permit provides enforceable terms on the character of the discharge, flow limitations, and monitoring and reporting.

5. Whether the proposed discharge will violate water quality standards or degrade water quality in the receiving waters, including Flat Creek and the Neches River.
6. Whether the facility will cause nuisance conditions.
7. Whether the facility violates the Commission's regionalization policy.
8. Whether the facility or proposed discharge will adversely affect wetlands.
9. Whether the proposed discharge, including pharmaceutical and other potentially dangerous contaminants, will adversely affect health and safety.
10. Whether the proposed discharge, including pharmaceutical and other potentially dangerous contaminants, will adversely affect aquatic life.
11. Whether the proposed discharge, including pharmaceutical and other potentially dangerous contaminants, will adversely affect use and enjoyment of property.

**H. Maximum Expected Duration of Hearing**

Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(d)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

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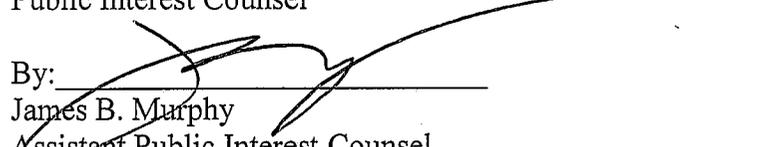
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#### IV. CONCLUSION

OPIC recommends denying the hearing requests. If the Commission concludes HRC, Dr. Van Dellen, or the TCA is affected, OPIC recommends granting the hearing requests on the issues referenced in Section III.G above, with a hearing duration of nine months.

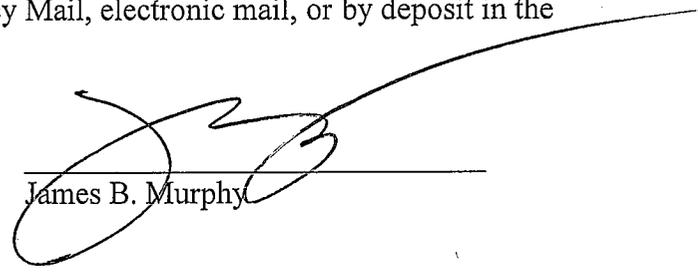
Respectfully submitted,

Blas J. Coy, Jr.  
Public Interest Counsel

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#### CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2010 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

  
James B. Murphy



**City of Bullard**  
**WQ0011787001**  
**Map Requested by TCEQ Office of Legal Services**  
**for Commissioners' Agenda**



Texas Commission on Environmental Quality  
 GIS Team (Mail Code 197)  
 P.O. Box 13087  
 Austin, Texas 78711-3087

February 8, 2010

0 0.1 0.2 0.4 Miles  
 Projection: Texas Statewide Mapping System  
 (TSSMS)  
 Scale 1:20,671

**Legend**

- Facility Property Boundary
- Discharge Point

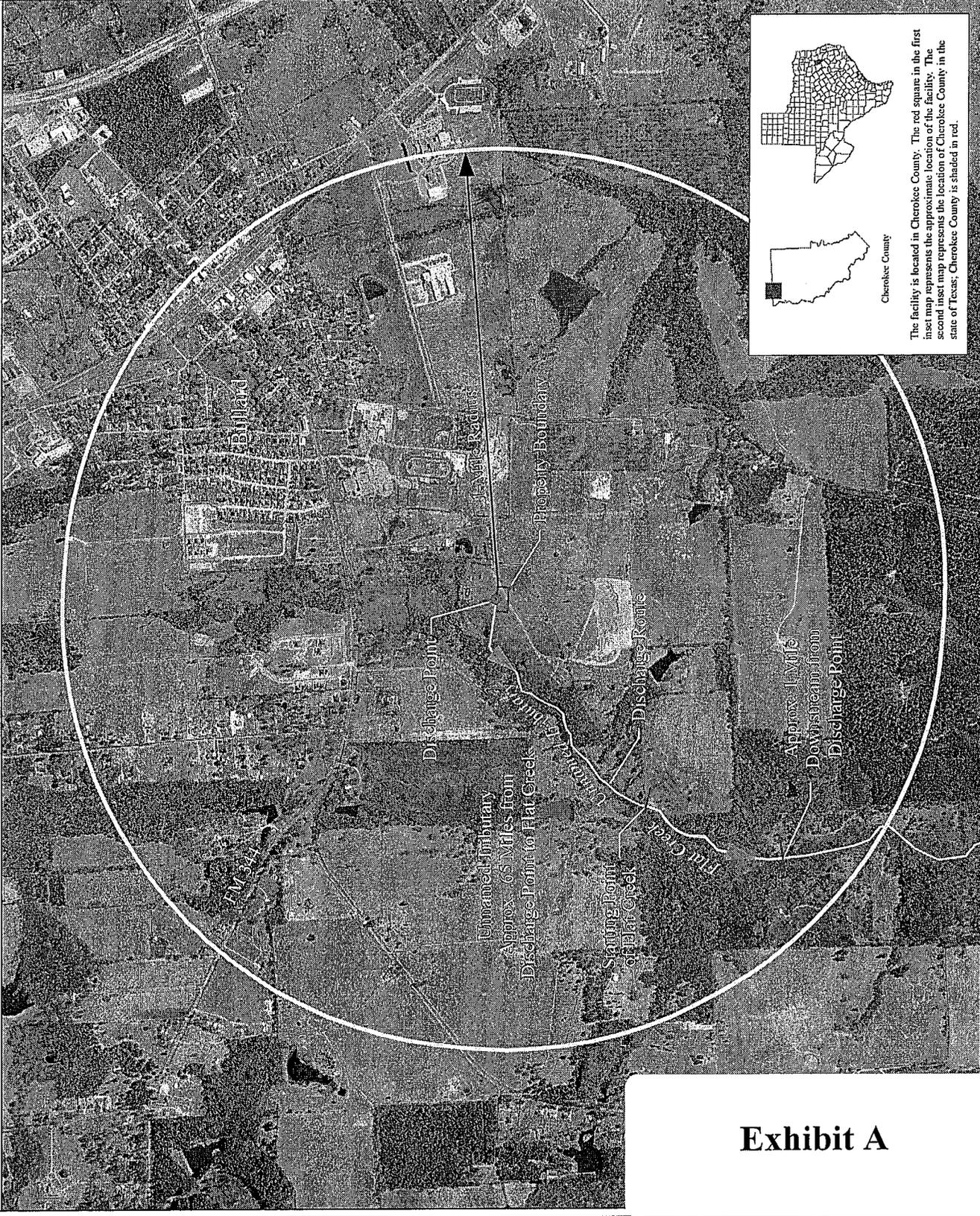
Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor. The vector data are U.S. Census Bureau 1992 TIGER/Line Data (1:100,000). The background of this map is a one-half meter photograph from the 2008 Texas Orthoregistry Project.

This map depicts the following:

- (1) The approximate location of the facility boundary. This is labeled "Property Boundary".
- (2) A circle and arrow depicting 1-mile radius. This is labeled "1-Mile Radius".
- (3) The discharge point. This is labeled "Discharge Point".
- (4) The discharge route. This is labeled "Discharge Route".

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This map was not generated by a licensed surveyor and is intended for illustrative purposes only. No claims are made to the accuracy or completeness of the data or to its suitability for a particular use. For more information concerning this map, contact the Information Resources Division at (512) 239-4800.

MapDrawSoft CRF-10028077



Cherokee County

The facility is located in Cherokee County. The red square in the first inset map represents the approximate location of the facility. The second inset map represents the location of Cherokee County in the state of Texas; Cherokee County is shaded in red.

**Exhibit A**



**City of Bullard**  
**WQ0011787001**  
**Map Requested by TCEQ Office of Legal Services**  
**for Commissioners' Agenda**



Texas Commission on Environmental Quality  
 GIS Team (Mail Code 197)  
 P.O. Box 13087  
 Austin, Texas 78711-3087

February 8, 2010

0 0.5 1 2 Miles

Projection: Texas Statewide Mapping System (TSMS)  
 Scale: 1:83,000

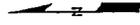
**Legend**

- Facility Property Boundary
- Discharge Point

Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requester. The vector data are U.S. Census Bureau 1992 TIGER/Line Data (1:100,000). The background of this map is a one-half meter photograph from the 2008 Texas Orthoimagery Project.

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J:\McDowell\CFR-100209174



Cherokee County

The facility is located in Cherokee County. The red square in the first inset map represents the approximate location of the facility. The second inset map represents the location of Cherokee County in the state of Texas; Cherokee County is shaded in red.



**MAILING LIST  
CITY OF BULLARD  
TCEQ DOCKET NO. 2010-0237-MWD**

**FOR THE APPLICANT:**

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**FOR OFFICE OF PUBLIC ASSISTANCE:**

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**FOR ALTERNATIVE DISPUTE**

**RESOLUTION:**

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**FOR THE CHIEF CLERK:**

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