

TCEQ AIR QUALITY PERMIT NUMBER 8773oL001
TCEQ DOCKET NO. 2011-0172-AIR

APPLICATION BY	§	BEFORE THE TEXAS
CONNERS CONSTRUCTION, INC	§	COMMISSION ON
PORTABLE ROCK CRUSHER	§	ENVIRONMENTAL QUALITY
KOSSE, FALLS COUNTY, TEXAS	§	

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this response (Response) to the requests for a contested case hearing submitted by persons listed herein. The Texas Clean Air Act (TCAA) §382.056(n) requires the Commission to consider hearing requests in accordance with the procedures provided in Tex. Water Code §5.556.¹ This statute is implemented through the rules in 30 Texas Administrative Code (TAC) Chapter 55, Subchapter F.

A map showing the location of the site for the proposed facility is included with this response and has been provided to all persons on the attached mailing list. In addition, a current compliance history report, technical review summary, modeling audit, and draft permit prepared by the ED's staff will be filed with the TCEQ's Office of Chief Clerk for the Commission's consideration. Finally, the ED's Response to Public Comments (RTC), which was mailed by the chief clerk to all persons on the mailing list, is on file with the chief clerk for the Commission's consideration.

I. Application Request and Background Information

Connors Construction, Inc. (Applicant or Connors) has applied to the TCEQ for a New Source Review Authorization under Texas Clean Air Act (TCAA), §382.0518. This will authorize the construction of a new facility that may emit air contaminants.

This permit will authorize Applicant to construct a portable rock crusher. The facility is located on the east and west side of County Road 246, approximately three fourths of a mile north of FM 413, in Falls County. Contaminants authorized under this permit include: particulate matter (PM).

The permit application was received on March 19, 2009 and declared administratively complete on March 31, 2009. The Notice of Receipt and Intent to Obtain an Air Quality Permit (first public notice) for this permit application was published on April 8 and May 13, 2009 in the *Marlin Democrat*. The Notice of Application and Preliminary Decision

¹ Statutes cited in this response may be viewed online at www.capitol.state.tx.us/statutes/statutes.html. Relevant statutes are found primarily in the Texas Health and Safety Code and the Texas Water Code. The rules in the Texas Administrative Code may be viewed online at www.sos.state.tx.us/tac/index.shtml, or follow the "Rules, Policy & Legislation" link on the TCEQ website at www.tceq.state.tx.us.

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(second notice) was published on February 10, 2010 in the *Marlin Democrat*. A public meeting regarding this permit application was held on March 11, 2010.

The Office of Chief Clerk received 13 timely hearing requests from the following persons: Evelyn Bostick, Paul Bostick, Judith Cobb, Alfred Corum, George Harlan, Zill Harlan, David Kinard, Robin Swinnea, Alvena White, Bob White, Jim Woliver, Bob Woliver, and Pamela Kelley. Pamela Kelly later withdrew her hearing request.

The ED's Response to Comments (RTC) was filed with the chief clerk on December 10, 2010 and mailed on December 15, 2010 to all interested persons, including those who asked to be placed on the mailing list for this application and those who submitted comments or requests for contested case hearing. The cover letter attached to the RTC included information about making requests for contested case hearing or for reconsideration of the ED's decision.² The letter also explained hearing requesters should specify any of the ED's responses to comments they dispute and the factual basis of the dispute, in addition to listing any disputed issues of law or policy.

II. Applicable Law

The Commission must assess the timeliness and form of the hearing requests, as discussed above. The form requirements are set forth in 30 TAC § 55.201(d):

(d) A hearing request must substantially comply with the following:

- 1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- 2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requester's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requester believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- 3) request a contested case hearing;

² See TCEQ rules at 30 TAC Chapter 55, Subchapter F. Procedural rules for public input to the permit process are found primarily in 30 TAC Chapters 39, 50, 55 and 80.

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- 4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requester should, to the extent possible, specify any of the Executive Director's responses to comments that the requester disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- 5) provide any other information specified in the public notice of application.

The next necessary determination is whether the requests were filed by "affected persons" as defined by Tex. Water Code § 5.115, and implemented in Commission rule 30 TAC § 55.203. Under 30 TAC § 55.203, 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Local governments with authority under state law over issues raised by the application receive affected person status under 30 TAC § 55.203(b).

In determining whether a person is affected, 30 TAC § 55.203(c) requires all factors be considered, including, but not limited to, the following:

- 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.

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In addition to the requirements noted above regarding affected person status, in accordance with 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- 1) One or more members of the group or association would otherwise have standing to request a hearing in their own right;
- 2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- 3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.³

If the Commission determines a hearing request is timely and fulfills the requirements for proper form and the hearing requester is an affected person, the Commission must apply a three-part test to the issues raised in the matter to determine if any of the issues should be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. The three-part test in 30 TAC § 50.115(c) is as follows:

- 1) The issue must involve a disputed question of fact;
- 2) The issue must have been raised during the public comment period; and
- 3) The issue must be relevant and material to the decision on this application.

The law applicable to the proposed facility may generally be summarized as follows. A person who owns or operates a facility or facilities that will emit air contaminants is required to obtain authorization from the Commission prior to the construction and operation of the facility or facilities.⁴ Thus, the location and operation of the proposed facility requires authorization under the TCAA. Permit conditions of general applicability must be in rules adopted by the Commission.⁵ Those rules are found in 30 TAC Chapter 116. In addition, a person is prohibited from emitting air contaminants or performing any activity that violates the TCAA or any Commission rule or order, or that causes or contributes to air pollution.⁶ The relevant rules regarding air emissions are found in 30 TAC Chapters 101 and 111-118. In addition, the Commission has the authority to establish and enforce permit conditions consistent with this chapter.⁷

³ 30 TAC § 55.205(a)

⁴ TEXAS HEALTH & SAFETY CODE § 382.0518

⁵ TEXAS HEALTH & SAFETY CODE § 382.0513

⁶ TEXAS HEALTH & SAFETY CODE § 382.085 (a) and (b).

⁷ TEXAS HEALTH & SAFETY CODE § 382.0513

III. Analysis of Hearing Requests

A. Were the requests for a contested case hearing in this matter timely and in proper form?

The following persons or groups submitted timely hearing requests and provided an address that is within one mile of the proposed facility (see attached map): Judith Cobb, Zill Harlan, Alvena White, and Bob White. The hearing requests were submitted during the public comment period or during the period for requesting a contested case hearing after the filing of the ED's RTC. Furthermore, the ED has determined the hearing requests of all the requesters substantially comply with all of the requirements for form in 30 TAC § 55.201(d).

The ED addressed all public comments in this matter by providing responses in the RTC. The cover letter from the Office of the Chief Clerk attached to the RTC states that requesters should, to the extent possible, specify any of the ED's responses in the RTC that the requesters dispute and the factual basis of the dispute, and list any disputed issues of law or policy.⁸ The ED is unaware that any responses were filed by any of the hearing requesters. In the absence of a response from any of the hearing requesters or their representatives within the thirty-day period after the RTC was mailed, the ED cannot determine or speculate whether the hearing requesters continue to dispute issues of fact, or whether there are any outstanding issues of law or policy. The ED assumes the requesters continue to dispute all of the issues raised by hearing requesters and commenters regarding this application as listed below.

B. Are those who requested a contested case hearing in this matter affected persons?

All of the requesters have demonstrated that they are "affected persons" as defined in 30 TAC § 55.203. The threshold test of affected person status is whether the requester has a personal justiciable interest affected by the application, and this interest is different from that of the general public.⁹ All of the hearing requesters who submitted requests on this application listed at least one personal justiciable interest affected by the application. Distance from the proposed facility is key to the issue whether or not there is a likely impact of the regulated activity on a person's interests such as the health and safety of the person, and on the use of property of the person. The ED has identified the following requesters who reside at or within 1 mile of the proposed facility and thus may be affected in a manner different from the general public (see the attached map for individual requesters): Judith Cobb, Zill Harlan, Alvena White, Bob White.

⁸ See 30 TAC § 55.201(d)(4).

⁹ *United Copper Industries and TNRCC v. Joe Grissom*, 17 S.W.3d 797 (Tex. App.-Austin, 2000)

C. Do those groups who requested a hearing meet the group or associational standing requirements?

No parties representing themselves as a group or an association submitted hearing requests regarding this permit application.

D. Which issues in this matter should be referred to SOAH for hearing?

If the Commission agrees with the assessment of the ED and finds that some or all of the hearing requesters are affected persons, the Commission must apply the three-part test discussed in Section II to the issues raised in this matter to determine if any of the issues should be referred to SOAH for a contested case hearing. The three-part test asks whether the issues involve disputed questions of fact, whether the issues were raised during the public comment period, and whether the issues are relevant and material to the decision on the permit application, in order to refer them to SOAH.

The ED addressed all public comments in this matter by providing responses in the RTC. The cover letter from the Office of the Chief Clerk transmitting the RTC cites 30 TAC § 55.201(d)(4), which states that requesters should, to the extent possible, specify any of the ED's responses in the RTC the requesters dispute and the factual basis of the dispute, and list any disputed issues of law or policy. In the absence of a response from any of the hearing requesters considered to be affected persons or their representatives within the thirty-day period after the RTC was mailed, the ED cannot determine or speculate whether the hearing requesters considered to be affected persons continue to dispute issues of fact, or whether there are any outstanding issues of law or policy. The ED nevertheless has included all of the issues raised by hearing requesters regarding this application as listed below.

1. Issues involving questions of fact.

Requesters raised the following issues in comments and hearing requests filed on this application:

1. Whether air emissions from the proposed facility will adversely affect human health and welfare.
2. Whether air emissions from the proposed facility will adversely affect the environment.
3. Whether air emissions from the proposed facility will adversely affect air quality in the area.
4. Whether the proposed facility would adversely impact sensitive subgroups such as the elderly and people with existing respiratory conditions.
5. Whether the proposed facility will negatively impact requesters' land and personal property, including livestock.

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6. Whether cumulative effects caused by the proposed facility will negatively impact the surrounding area.
7. Whether noise from the proposed facility will negatively impact the surrounding area.
8. Whether the proposed facility will use adequate control technologies.
9. Whether the truck traffic caused by the proposed facility will negatively impact the surrounding area and its roads.
10. Whether the proposed facility will negatively impact hearing requesters' property values.
11. Whether Applicant should be allowed to build the proposed facility at the proposed location.
12. Whether the proposed facility will adversely affect the surrounding water quality.
13. Whether the proposed facility will negatively impact historic buildings in the area.
14. Whether blasting activities conducted at the proposed facility will negatively impact the surrounding area.

2. Were the issues raised during the public comment period?

The public comment period is defined in 30 TAC § 55.152. The public comment period begins with the publication of the Notice of Receipt and Intent to Obtain an Air Quality Permit. The end date of the public comment period depends on the type of permit. In this case, the public comment period began on April 8 2009, and ended on March 11, 2010 with a public meeting. All of the issues listed above upon which the hearing requests in this matter are based were raised in comments received during the public comment period.

3. Whether the issues are relevant and material to the decision on the application.

In this case, the permit would be issued under the Commission's authority in Tex. Water Code § 5.013(11) (assigning the responsibilities in Chapter 382 of the Tex. Health and Safety Code) and the TCAA. The relevant sections of the TCAA are found in Subchapter C (Permits). Subchapter C requires the Commission to grant a permit to construct or modify a facility if the Commission finds the proposed facility will use at least the best available control technology (BACT) and the emissions from the facility will not contravene the intent of the TCAA, including the protection of the public's health and physical property. In making this permitting decision, the Commission may consider Applicant's compliance history. The Commission by rule has also specified certain requirements for permitting. Therefore, in making the determination of relevance in this case, the Commission should review each issue to see if it is relevant to these statutory and regulatory requirements that must be satisfied by this permit application.

The ED finds the following issues relevant and material to the decision on the application:

1. Whether air emissions from the proposed facility will adversely affect human health and welfare.
2. Whether air emissions from the proposed facility will adversely affect the environment.
3. Whether air emissions from the proposed facility will adversely affect air quality in the area.
4. Whether the proposed facility would adversely impact sensitive subgroups such as the elderly and people with existing respiratory conditions.
5. Whether the proposed facility will negatively impact requesters' land and personal property, including livestock.
6. Whether cumulative effects cause by the proposed facility will negatively impact the surrounding area.
7. Whether the proposed facility will use adequate control technologies.

The ED finds the following issues are beyond the jurisdiction of TCEQ and thus not material to the decision on the application:

1. Whether noise from the proposed facility will negatively impact the surrounding area.
2. Whether the truck traffic caused by the proposed facility will negatively impact the surrounding area and its roads.
3. Whether the proposed facility will negatively impact hearing requesters' property values.
4. Whether Applicant should be allowed to build the proposed facility at the proposed location.
5. Whether the proposed facility will negatively impact historic buildings in the area.
6. Whether blasting activities conducted at the proposed facility will negatively impact the surrounding area.

The ED finds the following issues, although within the TCEQ's jurisdiction, not within the scope of this air permit review and thus not material to the decision on the application:

1. Whether the proposed facility will adversely affect the surrounding water quality.

IV. Maximum Expected Duration of the Contested Case Hearing

The ED recommends the contested case hearing, if held, should last no longer than six months from the preliminary hearing to the proposal for decision.

V. Executive Director's Recommendation

For the foregoing reasons, the Executive Director respectfully recommends the Commission:

A. Find all hearing requests in this matter were timely filed.

Find that the requests of the following groups or persons satisfy the requirements for form under 30 TAC§ 55.201(d) and are affected under 30 TAC § 55.203: Judith Cobb, Zill Harlan, Alvena White, and Bob White.

Deny all other hearing requests.

If the Commission determines any requester is an affected person, refer the following issues to SOAH:

1. Whether air emissions from the proposed facility will adversely affect human health and welfare.
 2. Whether air emissions from the proposed facility will adversely affect the environment.
 3. Whether air emissions from the proposed facility will adversely affect air quality in the area.
 4. Whether the proposed facility would adversely impact sensitive subgroups such as the elderly and people with existing respiratory conditions.
 5. Whether the proposed facility will negatively impact requesters' land and personal property, including livestock.
 6. Whether cumulative effects caused by the proposed facility will negatively impact the surrounding area.
 7. Whether the proposed facility will use adequate control technologies.
- B. Find the maximum expected duration of the contested case hearing, if held, would be six months.

Respectfully submitted,
Texas Commission on Environmental Quality
Mark R. Vickery, P.G., Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

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Representing the Executive Director of the
Texas Commission on Environmental Quality

Conner's Construction, Inc.
Permit No. 87730L001
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
 April 15, 2011



Projection: Texas Statewide Mapping System (TSMIS)
 Scale 1:38,000

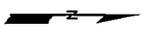
Legend

- Approximate Site Boundary
- Approximate Rock Crusher Boundary
- 542 Setback Line
- o Approximate Location of Requestor's Property
- Location of Rock Crusher

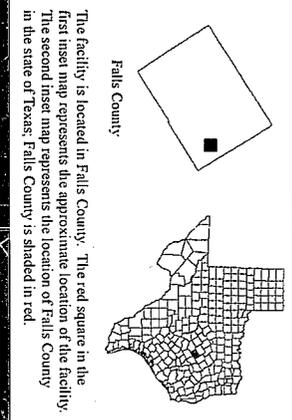
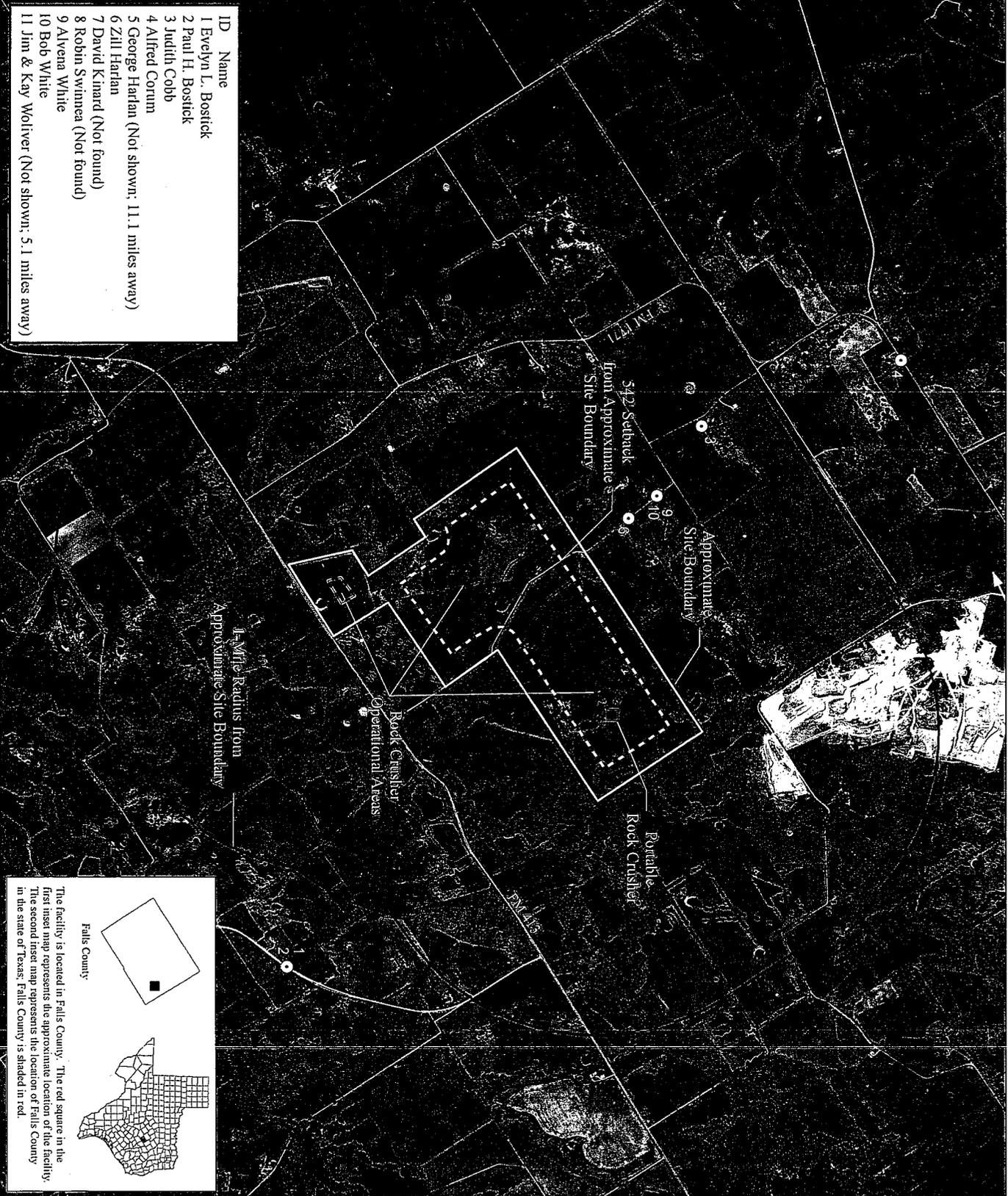
Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor. The vector data are U.S. Census Bureau 1992 TIGER/Line Data (1:100,000). The background of this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

This map depicts the following:

- (1) The approximate location of the site boundary. This is labeled "Approximate Site Boundary".
- (2) The location of the portable rock crusher. This is labeled "Portable Rock Crusher".
- (3) Polygon depicting the 1-mile radius of the site boundary. This is labeled "1-Mile Radius from Approximate Site Boundary".
- (4) Polygons depicting the 542 setback from the site boundary. This is labeled "542 Setback from Approximate Site Boundary".
- (5) Polygons depicting the approximate rock crusher operational areas. These are labeled "Rock Crusher Operational Areas".
- (6) Locations of the requestors. These are labeled with a number corresponding to the list on the map.



ID	Name
1	Evelyn L. Bostick
2	Paul H. Bostick
3	Judith Cobb
4	Alfred Corum
5	George Harlan (Not shown; 11.1 miles away)
6	Zill Harlan
7	David Kinard (Not found)
8	Robin Swinnea (Not found)
9	Alvena White
10	Bob White
11	Jim & Kay Wolliver (Not shown; 5.1 miles away)



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

This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.

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CERTIFICATE OF SERVICE

On the 18 day of April 2011, a true and correct copy of the foregoing instrument was served on all persons on the attached mailing list by the undersigned via deposit into the U.S. Mail, inter-agency mail, facsimile, electronic mail, or hand delivery.

A handwritten signature in cursive script that reads "Douglas Brown". The signature is written in black ink and is positioned above a horizontal line.

Douglas M. Brown

Mailing List
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Docket No. 2011-0172-AIR; Permit No. 87730L001

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WITHDRAW OF REQUEST(S)

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PUBLIC OFFICIALS – INTERESTED PERSON(S)

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