

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 18, 2011

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: **CONNERS CONSTRUCTION, INC.**
TCEQ DOCKET NO. 2011-0172-AIR

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur", written over a horizontal line.

Garrett Arthur, Attorney
Assistant Public Interest Counsel

Enclosure

DOCKET NO. 2011-0172-AIR

APPLICATION BY CONNERS CONSTRUCTION, INC. AIR QUALITY PERMIT NO. 87730LOO1	§ § § §	BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
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**OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to hearing requests in the above-referenced matter.

I. Introduction

On March 19, 2009, Connors Construction, Inc. ("Connors" or the "Applicant") applied to the TCEQ for proposed Air Quality Permit No. 87730LOO1. This permit would authorize the construction and operation of a rock crushing plant. The proposed site is located in Falls County, on the east and west sides of County Road 246, approximately .75 miles north of FM 413.

Connors' application was declared administratively complete March 31, 2009. The first newspaper notice was published April 8 and May 13, 2009 in *The Marlin Democrat*. The second newspaper notice was published February 10, 2010 in the same newspaper. On March 11, 2010, TCEQ conducted a public meeting in Marlin. The public comment period closed March 12, 2010. The TCEQ Executive Director's (ED) Response to Comments (RTC) was mailed December 15, 2010, and the deadline for hearing requests was January 14, 2011.

The TCEQ received timely hearing requests from the following people: Evelyn and Paul Bostick, Judith Cobb, Alfred Corum, George Harlan, Zill Harlan, David Kinard, Robin Swinnea, Alvena White, Bob White, and Jim and Kay Woliver.

For the reasons stated herein, OPIC recommends the Commission grant the hearing requests from Evelyn and Paul Bostick, Judith Cobb, Alfred Corum, Zill Harlan, Robin Swinnea, and Alvena White.

II. Applicable Law

This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999).

Under Title 30, Texas Administrative Code (TAC) § 55.201(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;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor 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;
- (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 requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor 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.

Under 30 TAC § 55.203(a), 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. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors 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, safety, and 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.

Under 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.

Under 30 TAC § 55.211(c)(2), a hearing request made by an affected person shall be granted if the request:

- (A) raises disputed issues of fact that were raised during the comment period, that were not withdrawn by the commenter by filing a withdrawal letter with the chief

clerk prior to the filing of the executive director's response to comment, and that are relevant and material to the commission's decision on the application;

- (B) is timely filed with the chief clerk;
- (C) is pursuant to a right to hearing authorized by law; and
- (D) complies with the requirements of § 55.201.

III. Analysis of Hearing Requests

A. Whether the requestors are affected persons

Evelyn and Paul Bostick

The Bosticks are concerned that the proposed plant will cause human health effects and degrade air quality. According to a map prepared by ED staff and attached hereto, the Bosticks reside just over one mile from the proposed site. Given their proximity to the proposed plant and their concerns regarding health effects and air quality, the Bosticks have personal justiciable interests in this matter which are not common to the general public. Additionally, their stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. Therefore, Evelyn and Paul Bostick should be considered affected persons in this matter.

Judith Cobb

Judith Cobb is concerned that the proposed plant will cause health effects. According to the ED's map, Ms. Cobb resides within one mile of the proposed site. Given her proximity to the proposed plant and her concern regarding health effects, Ms. Cobb has a personal justiciable interest in this matter which is not common to the general public. Additionally, her stated interest is an interest protected by the law under which this application will be considered, and a reasonable relationship exists between

her interest and the regulation of air emissions. Therefore, Judith Cobb should be considered an affected person in this matter.

Alfred Corum

Alfred Corum is concerned that the proposed plant will cause health effects. According to the ED's map, Mr. Corum resides just over one mile from the proposed site. Given his proximity to the proposed plant and his concern regarding health effects, Mr. Corum has a personal justiciable interest in this matter which is not common to the general public. Additionally, his stated interest is an interest protected by the law under which this application will be considered, and a reasonable relationship exists between this interest and the regulation of air emissions. Therefore, Alfred Corum should be considered an affected person in this matter.

Zill Harlan

Zill Harlan is concerned about health effects, property damage, the welfare of his livestock, and property value. The ED's map indicates that Mr. Harlan resides within a mile of the proposed site. Given his proximity to the proposed plant and his concerns regarding health effects, property damage, and livestock welfare, Mr. Harlan has personal justiciable interests in this matter which are not common to the general public. Additionally, his stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. Therefore, Zill Harlan should be considered an affected person in this matter.

Robin Swinnea

Robin Swinnea is concerned about human health effects and the welfare of her livestock. Ms. Swinnea has provided only a post office box address, but in her hearing request, she states that her show lamb operation is located right across from the proposed rock crusher site. Given her apparent proximity to the proposed site and her concerns regarding health effects and livestock welfare, Ms. Swinnea has a personal justiciable interest in this matter which is not common to the general public. Additionally, her stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. Therefore, Robin Swinnea should be considered an affected person in this matter.

Alvena White

Alvena White is concerned about health effects, air quality, and the welfare of her livestock. According to the ED's map, Ms. White resides within a mile of the proposed site. Given her proximity to the proposed site and her concerns regarding health effects, air quality, and livestock welfare, Ms. White has a personal justiciable interest in this matter which is not common to the general public. Additionally, her stated interests are protected by the law under which this application will be considered, and a reasonable relationship exists between those interests and the regulation of air emissions. Therefore, Alvena White should be considered an affected person in this matter.

Bob White

In his hearing request, Bob White provides an address in San Francisco and states that he lives in California. In addition to having a California residence, Mr. White also claims to be a resident of Texas. For purposes of Texas residency, he states an

address of 403 FM 246, Marlin, Texas 76661. OPIC notes that this address appears to be the same address as hearing requestor Alvena White. Without additional information, including the amount of time Mr. White spends in Marlin at that address, OPIC cannot find him to be an affected person. If Bob White files a reply providing such information, OPIC may reconsider whether he is an affected person.

David Kinard

David Kinard is concerned about health effects, air quality, emissions modeling, emissions control technology, and monitoring. However, Mr. Kinard has provided only a post office box address and has not specified his location and distance relative to the proposed site. Consequently, the ED's map does not show Mr. Kinard's residence. Without a specific statement explaining his location and distance relative to the proposed site, Mr. Kinard's hearing request is deficient under 30 TAC § 55.201(d)(2). Therefore, OPIC cannot find that David Kinard is an affected person. If Mr. Kinard files a reply which provides his location and distance relative to the proposed site, OPIC may reconsider whether he is an affected person.

George Harlan

George Harlan states that he owns property on the northwest side of the Tate property. He is concerned about dust from the proposed Connors plant. According to the ED's map, Mr. Harlan resides approximately 11 miles from the proposed site. One of the factors used to determine whether a hearing requestor is an affected person is the likely impact of the regulated activity on the health, safety, and use of property of the requestor. 30 TAC § 55.203(c)(4). At a distance of 11 miles from the proposed site, OPIC finds it unlikely that Mr. Harlan will be impacted by dust from the proposed plant. If Mr. Harlan files a reply showing that he resides closer to the proposed site than

indicated by the ED's map, OPIC may reconsider whether he is an affected person, but at this time, OPIC cannot find that Mr. Harlan is an affected person.

Jim and Kay Woliver

The Wolivers are concerned about health effects, air quality, property values, noise, truck traffic, and road safety. According to the ED's map, the Wolivers reside approximately 5 miles from the proposed site. One of the factors used to determine whether a hearing requestor is an affected person is the likely impact of the regulated activity on the health, safety, and use of property of the requestor. 30 TAC § 55.203(c)(4). At a distance of 5 miles from the proposed site, OPIC finds it unlikely that the Wolivers will be impacted by the proposed plant. If the Wolivers file a reply showing that they reside closer to the proposed site than indicated by the ED's map, OPIC may reconsider whether they are affected persons, but at this time, OPIC cannot find that Jim and Kay Woliver qualify as affected persons.

B. Which issues raised in the hearing requests are disputed

All of the issues raised in the hearing requests are disputed.

C. Whether the dispute involves questions of fact or of law

All of the disputed issues involve questions of fact.

D. Whether the issues were raised during the public comment period

All of the issues were raised during the public comment period.

E. Whether the hearing requests are based on issues raised solely in a public comment which has been withdrawn

None of the hearing requests are based on issues raised solely in a public comment which has been withdrawn.

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

Air Quality

Requestors have raised the issue of air quality. The purpose of the Texas Clean Air Act is to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants. Tex. Health & Safety Code § 382.002. The issue of air quality is therefore relevant and material to the Commission's decision on this application.

Health Effects

Requestors have raised the issue of human health effects resulting from the proposed emissions. The Texas Clean Air Act is intended to protect public health and general welfare. Tex. Health & Safety Code § 382.002. The issue of health effects is therefore relevant and material to the Commission's decision on this application.

Property Damage

At least one requestor has raised the issue of impacts to physical property. The Texas Clean Air Act is intended to protect physical property. See Tex. Health & Safety Code §§ 382.002 and 382.0518. Therefore, the issue of property damage is relevant and material to the Commission's decision on this application.

Livestock

Some of the requestors are concerned about the welfare of their livestock. Livestock, including lambs and cattle, may be considered property, and Texas Clean Air Act § 382.002 states that one of the purposes of the Act is the protection of property. Therefore, the issue is relevant and material to the Commission's decision on this application.

Property Values

Some of the requestors have raised the issue of diminished property values. The Commission does not have jurisdiction to consider property values, and this issue is therefore not relevant and material to the Commission's decision.

Noise

At least one requestor has raised the issue of noise. The TCEQ does not have the authority to regulate noise levels at a rock crushing plant. Therefore, this issue is not relevant and material to the Commission's decision.

Truck Traffic/Road Safety

The related issues of truck traffic and road safety have been raised. However, under the Texas Clean Air Act, the TCEQ lacks jurisdiction to regulate traffic on public roads, and therefore, these issues are not relevant and material to the Commission's decision.

G. Maximum expected duration for the contested case hearing

For the contested case hearing, OPIC estimates a maximum duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

IV. Conclusion

OPIC finds that Evelyn and Paul Bostick, Judith Cobb, Alfred Corum, Zill Harlan, Robin Swinnea, and Alvena White qualify as affected persons. We also find that all of these requestors have raised disputed issues of fact that are relevant and material to the Commission's decision on this application. Therefore, OPIC respectfully recommends the Commission grant their hearing requests.

OPIC further recommends that the following issues be referred to the State Office of Administrative Hearings for a contested case hearing:

1. Will the proposed facility adversely impact air quality?
2. Will the proposed facility cause adverse health effects?
3. Will the proposed facility adversely impact physical property?
4. Will the proposed facility adversely impact livestock?

For the contested case hearing, OPIC recommends a duration of nine months from the first day of the preliminary hearing to issuance of the proposal for decision.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Garrett Arthur
Assistant Public Interest Counsel
State Bar No. 24006771
P.O. Box 13087, MC 103
Austin, Texas 78711
(512) 239-5757
(512) 239-6377 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2011, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.


Garrett Arthur

MAILING LIST
CONNERS CONSTRUCTION, INC.
TCEQ DOCKET NO. 2011-0172-AIR

FOR THE APPLICANT:

Jeff Conners, Vice President
Conners Construction, Inc.
2513 US Highway 77
Lott, Texas 76656-3595
Tel: (254) 470-2900
Fax: (254) 456-2267

Tristan Walker, Environmental
Specialist
Westward Environmental, Inc.
P.O. Box 2205
Boerne, Texas 78006-3602
Tel: (830) 249-8284
Fax: (830) 249-0221

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

Douglas M. Brown, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

FOR OFFICE OF PUBLIC ASSISTANCE
via electronic mail:

Bridget Bohac, Director
Texas Commission on Environmental
Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE
RESOLUTION

via electronic mail:

Kyle Lucas
Texas Commission on Environmental
Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental
Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTERS:

Evelyn L. Bostick
1281 FM 2413
Kosse, Texas 76653-4475

Paul H. Bostick
1281 FM 2413
Kosse, Texas 76653-4475

Judith Cobb
129 PR 607
Marlin, Texas 76661-4701

Alfred Corum
774 FM 71771
Marlin, Texas 76661-4675

George Harlan
213 Royal Dr.
Marlin, Texas 76661-2038

Zill Harlan
372 County Road 246
Marlin, Texas 76661-4604

David Kinard
PO Box 3
Reagan, Texas 76680-0003

Robin Swinnea
PO Box 92
Reagan, Texas 76680-0092

Alvena White
403 County Road 246
Marlin, Texas 76661-4764

Bob White
1126 Church Street
San Francisco, California 94114-3404

Jim & Kay Woliver
1780 FM 1771
Kosse, Texas 76653-4430

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

0 0.1 0.2 0.4 0.6 0.8 Miles

Projection: Texas Statewide Mapping System
 (TSM5)

Scale 1:38,000

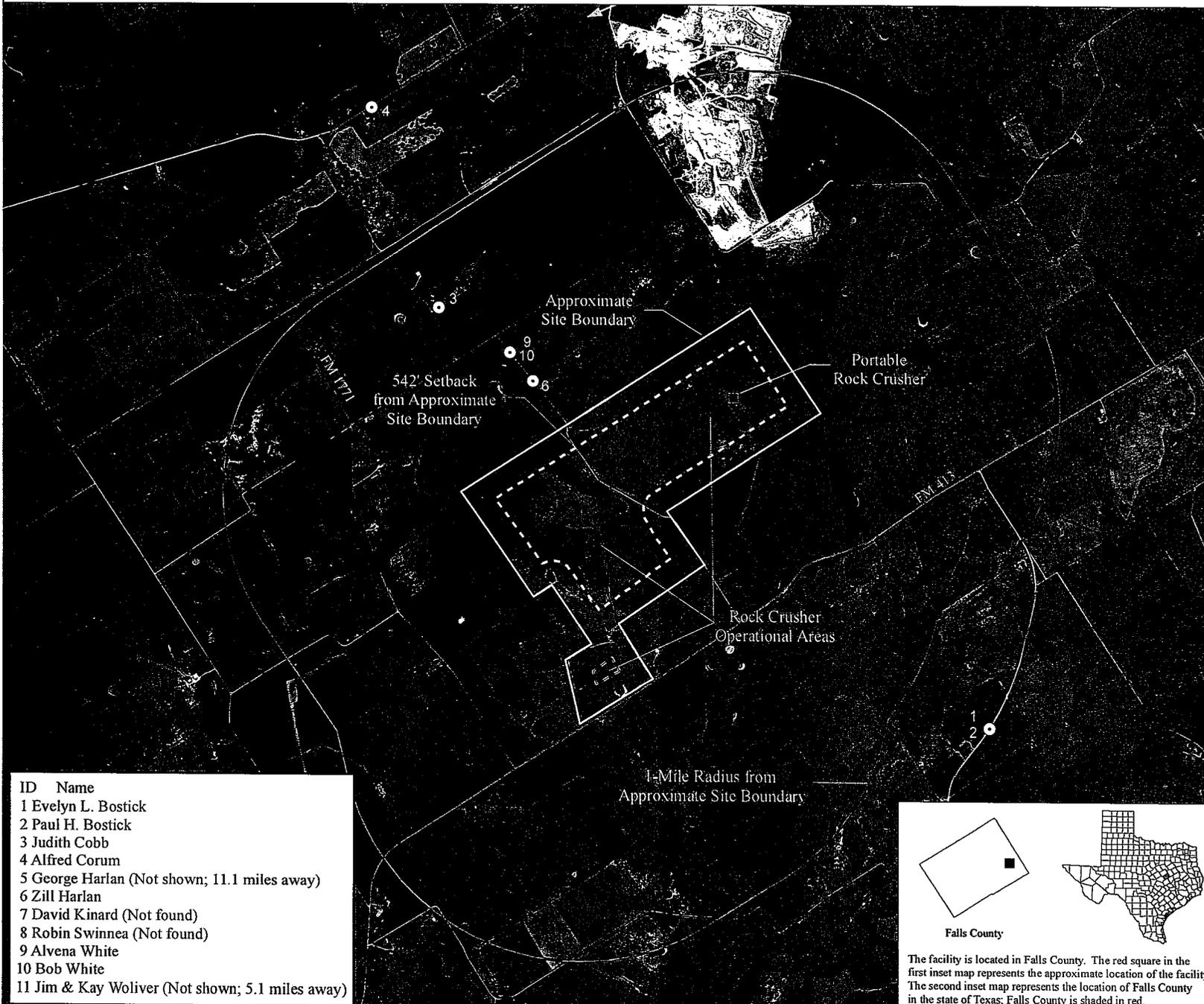
Legend

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

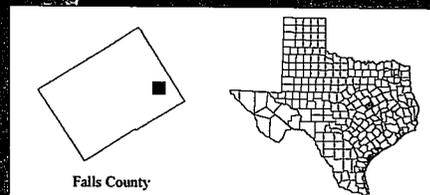
Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the requestor and the requestor information from the requestor. The vector data are U.S. Census Bureau 1992 TIGER/Line Data (1:100,000). The background of this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

This map depicts the following:

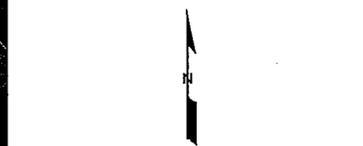
- (1) The approximate location of the site boundary. This is labeled "Approximate Site Boundary".
- (2) The location of the portable rock crusher. This is labeled "Portable Rock Crusher".
- (3) Polygon depicting the 1-mile radius of the site boundary. This is labeled "1-Mile Radius from Approximate Site 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 Woliver (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.