

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

March 14, 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: **PHW EMW AWB & EB TEXAS L.L.C.**
TCEQ DOCKET NO. 2011-0713-MWD

Dear Ms. Castañuela:

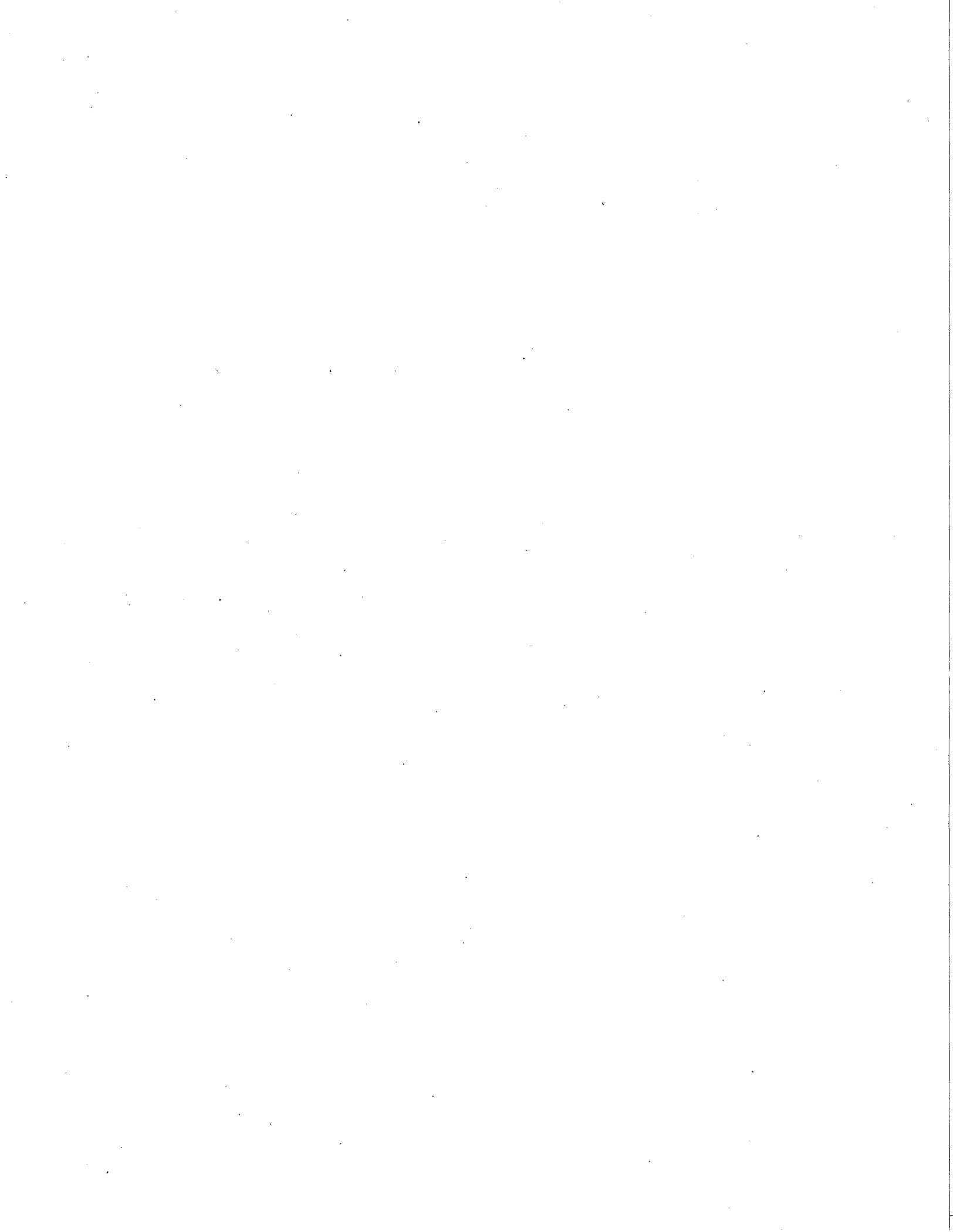
Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur".

Garrett Arthur, Attorney
Assistant Public Interest Counsel

Enclosure



DOCKET NO. 2011-0173-MWD

| | | |
|------------------------------------------|----------|----------------------------|
| APPLICATION BY | § | BEFORE |
| PHW EMW AWB & EB TEXAS L.L.C. | § | TEXAS COMMISSION ON |
| TPDES PERMIT | § | ENVIRONMENTAL |
| WQ0014970001 | § | QUALITY |

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 8, 2010, PHW EMW AWB & EB Texas L.L.C. ("Applicant") applied to the TCEQ for a new Texas Pollutant Discharge Elimination System (TPDES) permit. The permit would authorize the construction and operation of a domestic wastewater treatment plant to serve the Shady Hill Oaks Mobile Home and RV Park. The proposed plant would be located in Tarrant County at 5566 Mitchell Saxon Road, near the intersection of Mitchell Saxon Road and Banks Road.

Under the proposed permit, the plant would be allowed to discharge treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The treated effluent would be discharged via pipe to an unnamed tributary, then to Elm Branch, then to Village Creek, then to Lake Arlington in Segment No. 0828 of the Trinity River Basin. The unclassified receiving water uses are limited aquatic life use for the unnamed tributary and no significant aquatic life use for Elm Branch. The designated uses for Segment No. 0828 of the Trinity River Basin are high aquatic life use, public water supply, and contact recreation.

The application was declared administratively complete April 1, 2010. The first notice was published April 14, 2010 in *Tex-Mex Noticias* and April 17, 2010 in the *Fort Worth Star-Telegram*. The second notice was a combined notice and was published August 11, 2010 and August 21, 2010 in the same newspapers, respectively. On September 21, 2010, the TCEQ held a public meeting in Mansfield. The Executive Director's (ED) Response to Comments (RTC) was mailed December 28, 2010, and the deadline for hearing requests was January 27, 2011.

The TCEQ received timely hearing requests from the following people: Jeffrey Griffith, Donald Kinkade, Erwin Kraehemann, Carl Moore, Les Parker, and Frank Stalling. For the reasons stated herein, OPIC recommends the Commission grant all hearing requests.

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 § 55.211(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

1. Carl Moore

According to a map prepared by the ED's staff and attached hereto, the proposed discharge route crosses Carl Moore's property less than one mile from the proposed discharge point. Mr. Moore writes that the discharge will cause public health issues and environmental impacts on people and livestock in the area and down the discharge route, including Lake Arlington.

Given Mr. Moore's proximity to the proposed discharge route, his concerns regarding public health and the health of the watershed qualify as personal justiciable interests not common to the general public. Further, there is a reasonable relationship between his stated interests and the activities to be regulated under the proposed permit. Based on his personal justiciable interests, OPIC finds that Carl Moore is an affected person in this matter.

2. Les Parker

Like Carl Moore, the ED's map indicates the proposed discharge route crosses Les Parker's property less than one mile from the proposed discharge point. Mr. Parker writes that he is concerned, for himself and his horses, about mosquitoes and the West Nile Virus. He is also concerned about his horses and cows drinking treated wastewater

from the unnamed tributary. Finally, Mr. Parker is concerned that his stock tank and well will become contaminated.

Given Mr. Parker's proximity to the proposed discharge route, his concerns regarding vectors, health effects, and surface and ground water quality all qualify as personal justiciable interests which are not common to the general public. Further, there is a reasonable relationship between his stated interests and the activities to be regulated under the proposed permit. Based on his personal justiciable interests, OPIC finds that Les Parker is an affected person in this matter.

3. Frank Stalling

According to the ED's map, Frank Stalling's property is adjacent to both the proposed plant site and the discharge route. Mr. Stalling is concerned that the proposed discharge route includes a bar ditch adjoining his property line. He writes that the bar ditch is not meant to accommodate large volumes of constantly running fluids, and he is worried that effluent will erode the bar ditch. Mr. Stalling is also concerned about noise from the plant and monitoring of the plant.

The suitability of the plant site, and thus the discharge route, is judged under 30 TAC § 309.10. It is an interest protected by the law under which this application will be considered. Because of Mr. Stalling's proximity to the proposed plant site and discharge route, his concern regarding the suitability of the discharge route qualifies as a personal justiciable interest which is not common to the general public. Further, a reasonable relationship exists between Mr. Stalling's interest and the activities to be regulated under the proposed permit. Based on this personal justiciable interest, OPIC finds Frank Stalling to be an affected person.

4. Jeffrey Griffith

According to a map prepared by the ED's staff and attached hereto, Jeffrey Griffith resides within one mile of the proposed plant. Mr. Griffith writes that the excessive amount of wastewater introduced into the area would create a breeding ground for West Nile Virus and other diseases, and cause contamination and downstream destruction. He further writes that the plant would be a health and environmental hazard to neighboring properties.

Given Mr. Griffith's proximity to the proposed plant, his concerns regarding water quality and health effects qualify as personal justiciable interests not common to the general public. Further, there is a reasonable relationship between his stated interests and the activities to be regulated under the proposed permit. Based on his personal justiciable interests, OPIC finds that Jeffrey Griffith is an affected person in this matter.

5. Donald Kinkade

According to the ED's map, Donald Kinkade resides within one mile of the proposed plant. Mr. Kinkade writes that there will be public health issues and damage and contamination to the neighboring properties. He writes that the discharge could affect the ecosystem, fish, and drinking water. Mr. Kinkade is concerned about odor and sludge problems. He is also concerned about the possible devaluation of property and quality of life in the area.

Because of his proximity to the proposed plant, Mr. Kinkade's concerns about odor and the water quality of the local watershed are personal justiciable interests which are not common to members of the general public. The TCEQ regulates treatment

plants and wastewater discharges to prevent odor and contamination of local watersheds. Therefore, a reasonable relationship exists between Mr. Tarone's interests and the TCEQ's regulation of wastewater treatment plants. Based on his personal justiciable interests, OPIC finds that Donald Kinkade is an affected person in this matter.

6. Erwin Kraehemann

According to the ED's map, Erwin Kraehemann resides adjacent to the proposed site of the wastewater treatment plant. He is concerned that runoff from the proposed plant will negatively impact the environment, including fish and livestock. Mr. Kraehemann is also concerned about odor.

Given Mr. Kraehemann's proximity to the proposed plant, his concerns regarding odor and runoff qualify as personal justiciable interests not common to the general public. Further, there is a reasonable relationship between his stated interests and the activities to be regulated under the proposed permit. Based on his personal justiciable interests, OPIC finds that Erwin Kraehemann is an affected person in this matter.

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

1. Odor

The hearing requests have raised the issue of odor. Odor is specifically addressed by TCEQ regulations concerning the siting of domestic wastewater plants.¹ Therefore, odor is an issue which is relevant and material to the Commission's decision on this application.

2. Water Quality

The hearing requests have raised the issue of water quality. Water quality is an issue addressed by the Chapter 307 Texas Surface Water Quality Standards, and the issue is therefore relevant and material to the Commission's decision on this application.²

3. Health Effects

The hearing requests have raised the issue of health effects for humans and animals, including livestock. This issue concerns the Texas Surface Water Quality Standards and is therefore relevant and material to the Commission's decision on this application.³

¹ See 30 TAC § 309.13.

² See 30 TAC Chapter 307.

³ *Id.*

4. Groundwater Quality

The hearing requests have raised the issue of groundwater quality. The TCEQ regulates the siting of wastewater treatment plants in relation to public and private water wells.⁴ The issue of groundwater quality is therefore relevant and material to the Commission's decision on this application.

5. Vectors

The hearing requests have raised the issue of vectors, specifically mosquitoes, and the possibility that mosquitoes will breed along the discharge route and spread disease. This issue concerns nuisance conditions, and TCEQ rules regulate the siting of treatment plants to minimize the possibility of exposing the public to nuisance conditions.⁵ The issue of vectors is therefore relevant and material to the Commission's decision on this application.

6. Monitoring

The hearing requests raise the issue of whether the proposed plant will be properly monitored. The TCEQ regulates the monitoring of a wastewater treatment plant under Chapter 319 of its rules.⁶ Therefore, this issue is relevant and material to the Commission's decision on the application.

7. Suitability of the Discharge Route

The hearing requests raise the issue of whether the discharge route is suitable and appropriate. One of the purposes of TCEQ rules regarding plant siting is to prohibit issuance of a permit for a facility to be located in an area determined to be unsuitable or

⁴ See 30 TAC § 309.13.

⁵ See 30 TAC § 309.10(b).

⁶ See 30 TAC Chapter 319, Subchapter A.

inappropriate.⁷ Selecting a suitable and appropriate discharge route is an integral part of plant siting. This issue is therefore relevant and material to the Commission's decision on the application.

8. Property Value

The hearing requests have raised the issue of decreased property values. The TCEQ does not have jurisdiction to consider property values, and this issue is therefore not relevant and material to the Commission's decision.

9. Noise

The hearing requests have raised the issue of noise. The TCEQ does not have the authority to regulate noise levels at a wastewater treatment plant. Therefore, this issue is 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 Jeffrey Griffith, Donald Kinkade, Erwin Kraehemann, Carl Moore, Les Parker, and Frank Stalling all 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.

⁷ 30 TAC § 309.10(b).

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

1. Whether the proposed plant will cause nuisance odors?
2. Whether the proposed plant will adversely impact surface water quality?
3. Whether the proposed plant will adversely affect public health?
4. Whether the proposed plant will adversely impact groundwater quality?
5. Whether the proposed plant will cause nuisance conditions in the form of vectors?
6. Whether the proposed plant will be monitored in accordance with TCEQ regulations?
7. Whether the proposed discharge route is suitable and appropriate?

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
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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 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

PHW, EMW, AWB & EB Texas, LLC
TPDES Permit No. WQ0014970001
Map Requested by TCEQ Office of Legal Services
for Commissioners' Agenda



*Protecting Texas by
 Reducing and
 Preventing Pollution*

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

March 1, 2011

0 0.1 0.2 Miles

Projection: Texas Statewide Mapping System
 (TSMS)

Scale 1:14,000

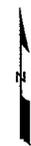
Legend

- Property Boundary
- Point of Discharge

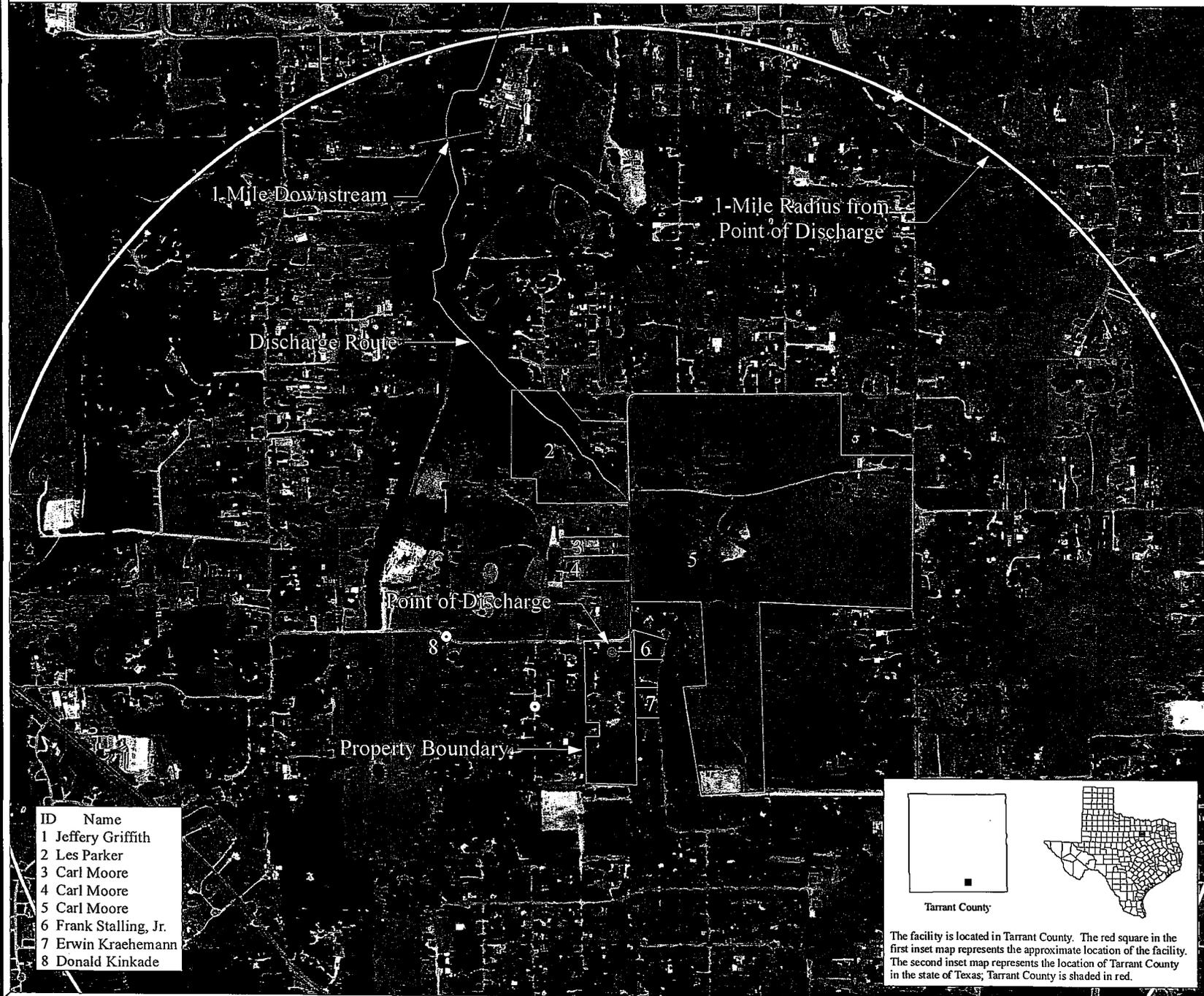
Source: The location of the facility was provided by the TCEQ Office of Legal Services (OLS). OLS obtained the site location information from the applicant and the requestor information from the requestor. The vector data are U.S. Census Bureau 1992 TIGER/Line Data (1:100,000). The background of this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

This map depicts the following:

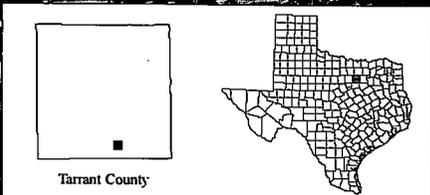
- (1) The approximate location of the property boundary. This is labeled "Property Boundary".
- (2) Circle and arrow depicting 1-mile radius. This is labeled "1-Mile Radius from Point of Discharge".
- (3) Lines and points representing requestor's property. These are labeled with a number corresponding to the list on the map.
- (4) The discharge route. This is labeled "Discharge Route".
- (5) The discharge point. This is labeled "Point of Discharge".



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.



| ID | Name |
|----|---------------------|
| 1 | Jeffery Griffith |
| 2 | Les Parker |
| 3 | Carl Moore |
| 4 | Carl Moore |
| 5 | Carl Moore |
| 6 | Frank Stalling, Jr. |
| 7 | Erwin Kraehemann |
| 8 | Donald Kinkade |



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

MAILING LIST
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TCEQ DOCKET NO. 2011-0173-MWD

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