

# MATHEWS & FREELAND, L.L.P.

ATTORNEYS AT LAW

JIM MATHEWS  
JOE FREELAND

P.O. Box 1568  
AUSTIN, TEXAS 78768-1568

(512) 404-7800  
FAX: (512) 703-2785

December 29, 2011

Bridget C. Bohac  
Texas Commission on Environmental Quality  
Office of the Chief Clerk MC-105  
P.O. Box 13087  
Austin, TX 78711-3087

RE: TCEQ Docket No. 2011-1490-MWD; City of Denison's Response to Request for Contested Case Hearing and Request for Reconsideration of Executive Director's Decision

Dear Ms. Bohac,

Enclosed please find the City of Denison's Response to Request for Contested Case Hearing and Request for Reconsideration of Executive Director's Decision for filing in the above referenced cause. This document is being filed with you electronically to comply with the deadline established through your December 15, 2011 order. The original will be forwarded to you by mail. Copies have been provided to all parties identified on the Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,



Jim Mathews

Cc: Service List  
Tom Akins  
David Howerton

**TCEQ DOCKET NO. 2011-1490-MWD**

**CITY OF DENISON  
APPLICATION TO RENEW  
PERMIT NO. WQ0010079003**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**CITY OF DENISON'S RESPONSE TO  
REQUEST FOR CONTESTED CASE HEARING AND REQUEST FOR  
RECONSIDERATION OF EXECUTIVE DIRECTOR'S DECISION**

The City of Denison ("City") files its Response to Request for Contested Case Hearing and Request for Reconsideration of Executive Director's Decision and in support thereof would show the following:

**SUMMARY OF ARGUMENT**

Protestant, Mrs. James Clement (Clement), requests a contested case hearing on the City of Denison's application to *renew* its current TPDES permit without amendment. There is no right to a contested case hearing for such application. Additionally, Clement is not an affected person. Accordingly, Clement's request for contested case hearing and for reconsideration of the Executive Director's decision that the permit application meets all the requirements of applicable law should be denied.

**BACKGROUND**

In October 2006 the City was issued TPDES Permit No. WQ0010079003 (the "Permit") authorizing the City to discharge treated wastewater effluent into the Red River. On November 30, 2010, prior to the expiration of the Permit, the City submitted an application to the Texas Commission on Environmental Quality ("TCEQ") *for the sole purpose of renewing the Permit* under the applicable provisions of the TCEQ rules and Chapter 26 of the Texas Water Code.<sup>1</sup> The application was declared administratively complete on December 15, 2010. The City published notice of receipt and intent to obtain a water quality permit on December 26, 2010, and notice of application and preliminary decision was published on May 1, 2011. Both notices

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<sup>1</sup> See Attachment 1 for excerpt from permit application stating that application is for "renewal of existing permit".

provided an opportunity for interested persons to request a public meeting regarding the application. The public comment period ended on May 31, 2011. Clement submitted comments on the application to the TCEQ on May 13, 2011. In her comments she expressed concerns that trees growing in the river had created a “large island” that disrupted the natural flow of the Red River and caused erosion to her property. Clement expressed the belief that the City’s wastewater contributed to the growth of trees. Clement requested that these trees be removed and that the City’s discharge be redirected. Clement’s letter requested neither a public meeting nor a contested case hearing.

The Executive Director filed a response to Clement’s comments on July 19, 2011. The Executive Director’s response stated: (1) the City’s application is for *renewal* of a domestic wastewater treatment facility and should not contribute to the impairment of the receiving stream; (2) the draft permit is protective of the environment, water quality, and human health, and meets TCEQ rules and requirements; (3) there is no need to include nutrient limits in the permit because, among other reasons, the City’s nutrient levels were below average<sup>2</sup> and the TCEQ has not yet adopted numeric nutrient criteria; (4) maps submitted with the applicant’s application indicate a preexisting island near the confluence of Paw Paw Creek and Red River; and (5) alluvial fans, such as those described by Clement, naturally occur where streams change gradient or flow into other streams.<sup>3</sup> The Executive Director also concluded that no changes to the draft permit were necessary in response to Clement’s comments.

By correspondence dated August 18, 2011 Clement submitted a written request for a contested case hearing and a request to reconsider the Executive Director’s decision. In Clement’s request she asserts that she is an “affected person” by virtue of the fact that she owns land that is adversely affected by the City’s discharges made under the authority of the Permit. Clement asserts that through a complicated chain of events the City’s discharge contributes to the growth of trees in the river channel which leads to the formation of islands, which redirects river flow, which causes erosion, which thereby damages her property.

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<sup>2</sup> The Fact Sheet and Executive Director’s Preliminary Decision on the City’s application notes at page 2 that the City’s daily average BOD<sub>5</sub> for the period November, 2008 to November, 2010 was 3.59 mg/l, which is only 18% of the permit allowable rate.

<sup>3</sup> The aerial photographs contained in Attachment 2 show alluvial fans in the Red River at its confluence with Paw Paw Creek and other tributary streams both upstream and downstream of the Paw Paw / Red River confluence.

For the reasons provided below, Clement's request for a contested case hearing should be denied because: (1) by law Clement has no right to a contested case hearing; and (2) Clement raises issues that are not affected by the City's application to renew its Permit.

### APPLICABLE LAW

Chapter 55 of the TCEQ's rules specifies that Clement has no right to a contested case hearing on the City's application to renew its Permit. Also, under Chapter 55 of the TCEQ's rules Clement has failed to raise issues that are affected by the permit renewal application.

#### Clement Has no Right to a Contested Case Hearing

Chapter 55, Subchapter F of the TCEQ's rules applies to applications filed under Chapter 26 of the Texas Water Code that are declared administratively complete on or after September 1, 1999. 30 TAC §55.200. The City's application meets those requirements. Section 55.201 (i) of the TCEQ's rules identifies those applications for which there is no right to a contested case hearing. They include applications under Chapter 26 of the Texas Water Code to renew a permit if:

- (1) the applicant is not applying to:
  - a. increase significantly the quantity of waste authorized to be discharged; or
  - b. change materially the pattern or place of discharge;
- (2) the activity to be authorized by the renewed permit will maintain or improve the quality of waste authorized to be discharged;
- (3) any required opportunity for public meeting has been given;
- (4) consultation and response to all timely received and significant public comment has been given; and
- (5) the applicant's compliance history for the previous five years raises no issues regarding the applicant's ability to comply with a material term of its permit. *Id.* at §55.201 (i)(5).

The City has not asked the TCEQ to make any amendments to its Permit. Instead, the City requests only that the TCEQ renew its existing permit with the existing permit parameters. Accordingly, the City's application *does not* seek to increase the quantity of waste to be discharged or to change the pattern or place of discharge. Furthermore, the activities authorized by the renewed permit will maintain or improve the quality of waste to be discharged and the

Executive Director has determined the permit parameters are protective of the environment, water quality, and human health, and that the draft permit meets TCEQ rules and requirements.

The record shows that TCEQ has provided Clement with an opportunity to request a public meeting and to provide comments on the application. Clement filed comments during the comment period, but no request was made for a public meeting. The Executive Director filed a written response to Clement's comments. As noted, the Executive Director concluded the City's application meets the TCEQ's rules and requirements.

The City's compliance history raises no issues regarding its ability to comply with the material terms of the Permit. The City's compliance history is classified as "average" and indicates no enforcement orders, court judgments, or consent decrees regarding operations of this wastewater treatment plant over the preceding five years.<sup>4</sup>

Accordingly, the record shows that: (1) all of the conditions of 30 TAC §55.201(i) have been met; (2) Clement has no right to a contested case hearing; and (3) the TCEQ is authorized to take action on the City's application without providing an opportunity for a contested case hearing.

#### Clement is not an Affected Person

Even if Clement potentially has a right to request a contested case hearing, which is not the case, she still would have to demonstrate she is an affected person before the TCEQ could grant her request. 30 TAC §55.201 (b)(4). 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.*" Id. at §55.203 (a) (emphasis added). Although Clement makes a number of arguments as to why she is an affected person, her complaint centers on the allegation on the bottom of page one of her hearing request stating that "the water flowing in Red River is diverted and this diverted water, along with the subject waste water [the City's discharges], flows onto/into my real property and impacts my real property in a way that causes unnatural growth of vegetation in some places and erosion in others." Her claimed personal justiciable interest is that she allegedly has suffered damage from erosion caused primarily by flooding. Clement attempts to establish a tenuous nexus between this flooding and the City's discharge by arguing that nutrients in the City's effluent contribute to the growth of trees which contribute to the capture of

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<sup>4</sup> See Attachment 3.

sediment, which contribute to the formation of islands, which cause a change in the flow of the Red River.

However, TCEQ's review of a water quality discharge renewal application does not include an analysis of whether flooding might occur if the City operates its wastewater treatment plant in accordance with its permit parameters. Instead, the TCEQ determines whether the proposed discharges will be protective of the environment, water quality and human health. Therefore, Clement's claimed interest in protecting her property from damage due to erosion she alleges is caused by flooding is not an interest affected by the application. Furthermore, the desire to address flooding concerns does not make Clement an affected person because those interests are not protected by the law under which the City's application will be considered. *Id.* at §55.203 (c)(1). Finally, Clement's request should be denied because her interests related to alleged flooding are neither relevant nor material to the TCEQ's decision on the City's application to renew its water quality permit. *Id.* at §55.211 (c)(2)(A). Clement's claim that the City's discharge contributes, through an attenuated chain of causation, to the Red River overflowing her property is without merit. Clement's request for hearing and request for reconsideration should be denied.

### REQUEST FOR RELIEF

The City respectfully requests that Clement's request for a contested case hearing and request for reconsideration of the Executive Director's decision be denied and that the City's application to renew its Permit be approved.

Respectfully submitted,

Mathews & Freeland, L.L.P.  
327 Congress Ave., Ste. 300  
Austin, Texas 78701  
Telephone (512) 404-7800  
Facsimile (512) 703-2785

By:

  
Jim Mathews  
TBN: 13188700  
email: jmathews@mandf.com  
ATTORNEYS FOR CITY OF DENISON

**CERTIFICATE OF SERVICE**

I hereby certify that on this the 29<sup>th</sup> day of December, 2011 a true and correct copy of the foregoing document was served by U.S. mail on the following:

Patsy Clement 1267 Georgetown Road Pottsboro, TX 75076-6905	Clyde M. Siebman Siebman, Burg, Phillips & Smith, LLP 300 North Travis Street Sherman, Texas 75090-5925 clydesiebman@siebman.com
Alicia Ramirez Texas Commission on Environmental Quality Environmental Law Division MC-173 P.O. Box 13087 Austin, TX 78711-13087 Alicia.Ramirez@tceq.texas.gov	Brian Christian Texas Commission on Environmental Quality Small Business and Environmental Assistance Division MC-108 P.O. Box 13087 Austin, TX 78711-13087 BCHRISTI@tceq.state.tx.us
Donald Camp Texas Commission on Environmental Quality Water Quality Division MC-148 P.O. Box 13087 Austin, TX 78711-13087 DON.CAMP@tceq.texas.gov	Bridget C. Bohac Texas Commission on Environmental Quality Office of the Chief Clerk MC-105 P.O. Box 13087 Austin, TX 78711-3087 BBOHAC@tceq.state.tx.us
Blas J. Coy, Jr. Texas Commission on Environmental Quality Public Interest Counsel MC-103 P.O. Box 13087 Austin, TX 78711-3087 BCOY@tceq.state.tx.us	

  
**Jim Mathews**

# **Attachment 1**



## **Attachment 2**

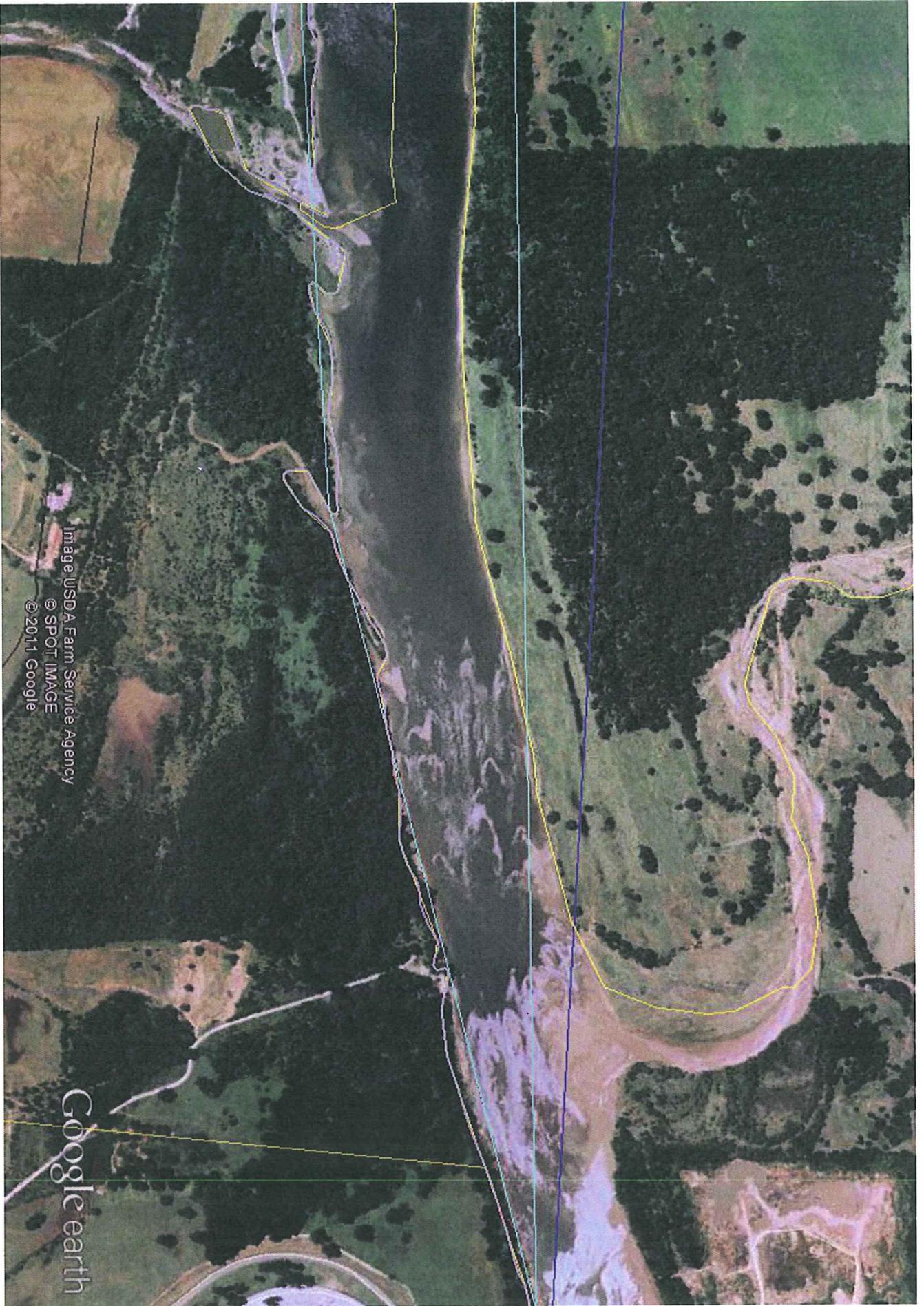


Image: USDA Farm Service Agency  
© SPOT IMAGE  
©2011 Google

Google earth

feet  
km



4000



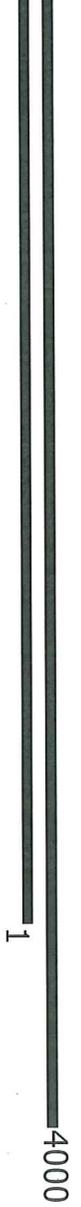
Google earth



Image USDA Farm Service Agency  
© SPOT IMAGE  
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Google earth

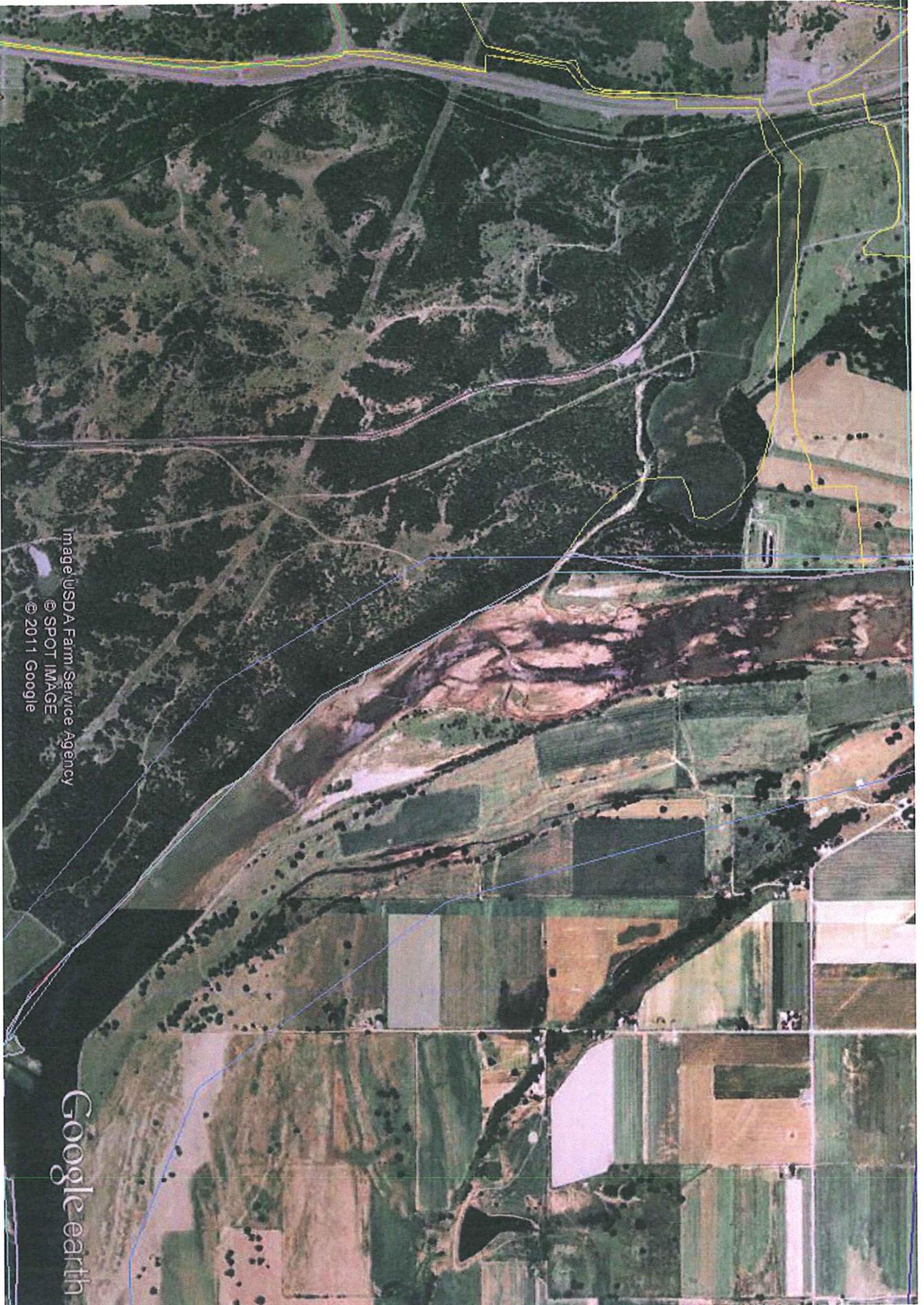
feet  
km



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Google earth



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miles  
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Google earth

Google earth

feet  
km



5000



## **Attachment 3**

## Compliance History

Customer/Respondent/Owner-Operator:	CN600457428 City of Denison	Classification: AVERAGE	Rating: 1.68
Regulated Entity:	RN102992567 PAW PAW PLANT	Classification: AVERAGE	Site Rating: 0.38
ID Number(s):	PRETREATMENT EPA ID TX004722800 PRETREATMENT PERMIT WQ0010079003 WASTEWATER PERMIT WQ0010079003 WASTEWATER EPA ID TX0047228 WASTEWATER LICENSING LICENSE WQ0010079003		
Location:	LOCATED E OF DENISON AND APPROX 2200 FT N AND 1600 FT E OF THE INTX OF CENTER ST AND FM 120		
TCEQ Region:	REGION 04 - DFW METROPLEX		
Date Compliance History Prepared:	December 21, 2011		
Agency Decision Requiring Compliance History:	Permit - Issuance, renewal, amendment, modification, denial, suspension, or revocation of a permit.		
Compliance Period:	November 05, 2005 to December 21, 2011		
TCEQ Staff Member to Contact for Additional Information Regarding this Compliance History			
Name:	Karen Smlth	Phone:	

### Site Compliance History Components

1. Has the site been in existence and/or operation for the full five year compliance period? YES
2. Has there been a (known) change in ownership/operator of the site during the compliance period? NO
3. If YES, who is the current owner/operator? N/A
4. If YES, who was/were the prior owner(s)/operator(s)? N/A
5. If YES, when did the change(s) in owner or operator occur? N/A
6. Rating Date: 9/1/2011 Repeat Violator: NO

### Components (Multimedia) for the Site :

- A. Final Enforcement Orders, court judgments, and consent decrees of the State of Texas and the federal government.
- B. Any criminal convictions of the state of Texas and the federal government.  
N/A
- C. Chronic excessive emissions events.  
N/A
- D. The approval dates of investigations. (CCEDS Inv. Track. No.)
 

1	05/31/2006	(467127)
2	02/21/2006	(472493)
3	03/16/2006	(472494)
4	11/18/2005	(472496)
5	12/20/2005	(472497)
6	06/22/2006	(480330)
7	04/20/2006	(500857)
8	05/22/2006	(500858)
9	06/16/2006	(500859)
10	05/22/2006	(500860)
11	05/22/2006	(500861)
12	11/30/2006	(515779)
13	08/18/2006	(523006)

14	10/06/2006	(531010)
15	09/18/2006	(547826)
16	10/16/2006	(547827)
17	11/20/2006	(547828)
18	12/15/2006	(547829)
19	04/12/2007	(556695)
20	06/01/2007	(562639)
21	02/16/2007	(580643)
22	03/20/2007	(580644)
23	03/20/2007	(580645)
24	05/15/2007	(580646)
25	06/18/2007	(580647)
26	03/20/2007	(580648)
27	08/14/2007	(603134)
28	02/11/2008	(617506)
29	09/19/2007	(621593)
30	10/16/2007	(621594)
31	11/14/2007	(621595)
32	09/19/2007	(621596)
33	05/05/2008	(640988)
34	02/19/2008	(673541)
35	03/20/2008	(673542)
36	12/17/2007	(673543)
37	06/08/2008	(682411)
38	04/08/2008	(691808)
39	05/15/2008	(691809)
40	06/16/2008	(691810)
41	04/08/2008	(691811)
42	04/08/2008	(691812)
43	08/15/2008	(712778)
44	09/17/2008	(712779)
45	02/26/2009	(724236)
46	10/16/2008	(728977)
47	11/18/2008	(728978)
48	03/16/2009	(737898)
49	02/17/2009	(752123)
50	03/20/2009	(752124)
51	01/06/2009	(752125)
52	04/15/2009	(769861)
53	04/15/2009	(769862)
54	04/15/2009	(769863)
55	02/18/2010	(809084)
56	05/19/2009	(809085)
57	06/18/2009	(809086)
58	08/17/2009	(809087)
59	09/17/2009	(809088)
60	10/19/2009	(809089)
61	11/23/2009	(809090)

62 12/17/2009 (809091)  
 63 03/17/2010 (832475)  
 64 04/15/2010 (832476)  
 65 05/20/2010 (832477)  
 66 06/14/2010 (846764)  
 67 07/12/2010 (861289)  
 68 08/18/2010 (867440)  
 69 12/09/2010 (871843)  
 70 12/01/2010 (872533)  
 71 09/16/2010 (874462)  
 72 12/21/2010 (877402)  
 73 10/28/2010 (882043)  
 74 12/15/2010 (888510)  
 75 01/11/2011 (890906)  
 76 12/17/2010 (896851)  
 77 01/18/2011 (902809)  
 78 03/29/2011 (907760)  
 79 02/17/2011 (909650)  
 80 03/17/2011 (916871)  
 81 03/17/2011 (926601)  
 82 05/18/2011 (938585)  
 83 06/16/2011 (945957)  
 84 07/14/2011 (953212)  
 85 09/30/2011 (958200)  
 86 08/15/2011 (959853)  
 87 09/19/2011 (965894)  
 88 10/17/2011 (971936)

E. Written notices of violations (NOV). (CCEDS Inv. Track. No.)

Date: 10/06/2006 (531010) CN600457428  
 Self Report? NO Classification: Moderate  
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(1)  
 30 TAC Chapter 305, SubChapter F 305.125(17)  
 Description: NON-RPT VIOS FOR MONIT PER OR PIPE  
 Date: 11/27/2006 (515779) CN600457428  
 Self Report? NO Classification: Major  
 Citation: 2D TWC Chapter 26, SubChapter A 26.121(a)(1)  
 Description: Failure to prevent any discharge which has reasonable likelihood of adversely  
 affecting human health or the environment.  
 Self Report? NO Classification: Minor  
 Citation: 30 TAC Chapter 305, SubChapter F 305.125(5)  
 Description: Failure to properly operate and maintain treatment units.  
 Date: 05/05/2008 (640988) CN600457428  
 Self Report? NO Classification: Minor  
 Citation: 40 CFR Chapter 403, SubChapter N, PT 403.403.12(g)(2)  
 Description: Failure to require resampling within 30 days of becoming aware of an effluent  
 limit violation.  
 Self Report? NO Classification: Moderate  
 Citation: 30 TAC Chapter 315, SubChapter A 315.1  
 Description: Failure to incorporate the "Act of God" clause into the local ordinance and  
 pretreatment program. Texas Administrative Code, Chapter 315.1, did not adopt  
 the provisions of 40 CFR 403.16, the affirmative defense clause.  
 Self Report? NO Classification: Minor  
 Citation: 30 TAC Chapter 315, SubChapter A 315.1  
 40 CFR Chapter 403, SubChapter N, PT 403.403.8(f)(5)

Description: Failure to adhere to the ERP by issuing an NOV by the 15 day limit. Ruiz self-monitoring event of September 27, 2007, was in violation of the oil & grease limit. Ruiz notified the City of the violation on October 5, 2007. The City issued a Notice of Violation on October 30, 2007, 10 days later than required by the ERP which states that the initial enforcement response with occur within 15 days of violation detection.

Self Report? NO Classification: Minor

Citation: 30 TAC Chapter 315, SubChapter A 315.1  
40 CFR Chapter 403, SubChapter N, PT 403 403.12(g)(2)

Description: Failure to conduct resampling within 30 days of identifying an effluent violation. City sampling conducted at Ruiz Food Products on November 15, 16, 19, 20, and 26, 2007 showed oil and grease violations. There was no SIU self-monitoring or City sampling event within 30 days of becoming aware of the violation.

Date: 11/30/2010 (872533) CN600457428

Self Report? NO Classification: Moderate

Citation: 30 TAC Chapter 317 317.3(a)  
30 TAC Chapter 317 317.3(e)(4)(C)

Description: Failure to secure the lift station wet well.

Self Report? NO Classification: Moderate

Citation: 30 TAC Chapter 317 317.3(e)(5)

Description: Failure to provide telemetry for the Ray Yard lift station.

Date: 12/10/2010 (871843) CN600457428

Self Report? NO Classification: Moderate

Citation: 30 TAC Chapter 315, SubChapter A 315.1  
40 CFR Chapter 403, SubChapter N, PT 403 403.8(f)(2)(vii)

Description: Failure to collect oil and grease samples such that data is defensible in court. During the site visit to Champion Cooler's South Plant, it was noted that oil and grease samples are being collected from a cleanout using a pump and tubing and not being caught directly into the sampling container.

Date: 12/21/2010 (877402) CN600457428

Self Report? NO Classification: Moderate

Citation: TWC Chapter 26 26.121  
WQ0010079-003 PERMIT

Description: Failure to submit a permit renewal application within six months of permit expiration.

F. Environmental audits.

N/A

G. Type of environmental management systems (EMSs).

H. Voluntary on-site compliance assessment dates.

N/A

I. Participation in a voluntary pollution reduction program.

N/A

J. Early compliance.

N/A

Sites Outside of Texas

N/A