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June 8, 2015

VIA E-FILING

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

Re: TCEQ Docket No. 2015-0663-MWD  
NASH FM 529, LLC; Permit No. WQ0015264001  
Response to Hearing Requests

Dear Ms. Bohac:

Please find enclosed for filing in the above-referenced matter Applicant NASH FM 529, LLC's Response to Hearing Requests. Copies of Applicant's Response to Hearing Requests are being served on the persons identified in the certificate of service.

Thank you for your attention to this matter. If you have any questions concerning this filing, please do not hesitate to contact me.

Very truly yours,



Danny Worrell

Enclosure

cc: Service List

**TCEQ PERMIT NO. WQ0015264001**

**APPLICATION BY NASH  
FM 529, LLC FOR TPDES PERMIT  
PERMIT NO. WQ0015264001**

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**BEFORE THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**APPLICANT'S RESPONSE TO HEARING REQUESTS**

TO THE HONORABLE COMMISSIONERS:

COMES NOW, NASH FM 529, LLC (“NASH” or “Applicant”) and files this response to the hearing requests regarding the application for Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0015264001, and respectfully shows the following:

**I. INTRODUCTION**

**A. Facility Description**

NASH has applied to the TCEQ for a new TPDES permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day (“gpd”) in the Interim I phase, an annual average flow not to exceed 500,000 gpd in the Interim II phase, and an annual average flow not to exceed 1,000,000 gpd in the Final phase of the Harris County MUD No. 171 wastewater treatment facility (“Facility”).

The Facility would serve the Harris County Municipal Utility District (MUD) No. 171 service area and would be located approximately 2,000 feet southeast from the intersection of Beckendorff Road and Porter Road in Harris County, Texas 77493. The treated effluent would be discharged to a man-made ditch; then to South Mayde Creek, then to Buffalo Bayou Above Tidal in Segment No. 1014 of the San Jacinto River Basin. The unclassified receiving water use is minimal aquatic life use for both the man-made channel and South Mayde Creek. The designated uses for Segment No. 1014 are limited aquatic life use and primary contact recreation.

## **B. Procedural Background**

The application in this case was submitted to TCEQ on May 30, 2014 (hereinafter referred to as the “Application”), and declared administratively complete on August 12, 2014. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published in English in the *Houston Chronicle* on August 22, 2014, and in Spanish in *La Voz* on August 24, 2014. The Executive Director’s (“ED’s”) Staff completed the technical review of the application on October 2, 2014, and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit was published in English in the *Houston Chronicle* on December 26, 2014, and in Spanish in *La Voz* on December 28, 2014. The public comment period ended on January 27, 2015. After the public comment period, the ED issued a Response to Comments (“RTC”) on March 19, 2015. The deadline for requesting a contested case hearing or reconsideration of the ED’s decision was April 23, 2015.

## **II. LEGAL STANDARDS GOVERNING HEARING REQUESTS**

Because the application was administratively complete on or after September 1, 1999, it is subject to the procedural requirements adopted pursuant to House Bill 801, 76<sup>th</sup> Legislature, 1999, and TCEQ rules at 30 Tex. Admin. Code (“TAC”) Chapter 55, Subchapter G, §§ 55.200-55.211.

Commission rules provide that a request for a contested case hearing shall be granted if the request is made by an “affected person” and it:

(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<sup>1</sup> of this title (relating to Requests for Reconsideration or Contested Case Hearing).

30 TAC § 55.211(c)(2).

An affected person is “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application.” 30 TAC § 55.203(a).

Commission rules also provide relevant factors that are to be considered in determining affected person status, 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 the property of the person; and
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person.

30 TAC § 55.203(c).

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<sup>1</sup> Section 55.201 specifies the requirements for reconsideration or contested case hearing. A request for a contested case hearing by an affected person must be in writing, filed with the Chief Clerk no later than 30 days after the Chief Clerk mails (or otherwise transmits) the Executive Director’s decision and response to comments and may not be based on an issue that was raised solely in a public comment withdrawn by the commenter in writing with the Chief Clerk prior to the filing of the ED’s Response to Comments. The 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 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; and (4) list all relevant and material disputed issues of fact that were raised in the public comment period and that are the basis of the hearing request. 30 TAC § 55.201(c) & (d).

Commission rules specify that a response to a request for hearing must specifically address the following:

- (1) whether the requester is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

Further, according to Commission rules, a group or association may request a contested case hearing only if the group or association meets all 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 rights the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

30 TAC § 55.205(a).

### **III. ANALYSIS OF HEARING REQUESTERS' STATUS AS AFFECTED PERSONS**

The timely hearing requesters on this application include Hanelore Domahidi, James Riley, Thomas Shacklett, and Christopher Spicer. NASH asserts that none of the requesters is an affected person based upon the factors set out in 30 TAC Section 55.203(c). As a result,

pursuant to 30 TAC Section 55.211(c)(2), all requests must be denied. The Applicant submits that the requesters are not affected persons because of the locations of the requesters' properties relative to the Facility and to the point at which treated effluent from the Facility enters South Mayde Creek. The nearest property line of the only requester with property on South Mayde Creek is located over one-third mile **upstream** from the point where the treated effluent would enter South Mayde Creek from the 1,971-foot long man-made channel. *See* Attachment A hereto. As shown on Attachment A, the nearest property line of any requester is almost one-half mile from the Facility. Further, the wind rose submitted with the Application, and copied for your convenience on Attachment A, shows that the predominant wind direction near the Facility is not toward the requesters' properties. The predominant wind direction at the Facility is from the southeast toward the northwest, and all of the requesters' properties are southwest of the Facility.

The following analysis addresses individual requesters. With respect to Ms. Domahidi, Mr. Riley, and Mr. Shacklett, Applicant objects to any determination that these individuals are affected persons because none of these individuals owns property along the discharge route, primarily South Mayde Creek in this area, or that borders or is adjacent to the proposed Facility. *See* Attachment A. Further, their properties are simply not near the Facility. The properties are on the opposite side of the Creek from the Facility, and **upstream** from the point where the treated effluent would enter. *See* Attachment A. The point of Ms. Domahidi's property that would be closest to the Facility is 4,461.22 feet away; the point of Mr. Riley's property that would be closest to the Facility is 3,758.33 feet away; and the point of Mr. Shacklett's property that would be closest to the Facility is 3,700.36 feet away. All are far outside the 150-foot buffer

zone that would surround the Facility. These individuals' interests are no different from that of the general public, and therefore, they should not be considered affected persons.

With respect to Mr. Spicer, Applicant similarly objects to any determination that he is an affected person. Although he owns property bordering South Mayde Creek, the point of his property closest to the Facility is 2,132 feet along the Creek **upstream** from the point where treated effluent would enter the Creek from the man-made discharge channel. The point of his property that would be closest to the Facility is 2,577.53 feet away from the Facility.

Because of the locations of the requesters' properties and the Facility, the proposed discharge and the Facility will have no impact on the health and safety of the requesters, or on the use of their properties that would be different than that of the general public. For these reasons, none of the requesters is an affected person. The interests they have asserted are no different than those of the general public, and all of the requests for contested case hearing should be denied.

#### **IV. ISSUES RAISED**

If the Commission were to determine that one or more hearing requesters is an affected person, the Commission must determine which issues should be referred to the State Office of Administrative Hearings ("SOAH") for consideration in the contested case hearing. *See* Tex. Water Code § 5.556. Section 5.556 also requires the Commission to limit the number and scope of issues that are referred to SOAH for hearing. *Id.*

Most of the issues raised in this case were raised by multiple hearing requests and have been addressed by the ED's RTC, dated March 19, 2015.<sup>2</sup> As discussed above, the Applicant objects to the affected person designation of all of the requesters, but the analysis below

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<sup>2</sup> Note that one hearing request – filed by Brenda Thompson received on April 27, 2015 – is not timely because it was received after the April 23, 2015 deadline.

considers all issues raised by the requesters. This analysis will attempt to track the RTC's review.

1. Potential Flooding (ED's RTC No. 1)

Ms. Domahidi, Mr. Shacklett, and Mr. Spicer raise concerns that the proposed discharge would potentially exacerbate flooding problems that the area has experienced. As the ED's Response noted, the TCEQ does not have jurisdiction to address flooding issues as part of the wastewater permitting process. The permitting process is limited to controlling the discharge of pollutants into waters of the state and protecting the water quality of the state's rivers, lakes, and coastal waters. Consequently, this issue is not a relevant and material issue for this case and should not be considered for referral to SOAH.

Further, TCEQ siting requirements do not allow wastewater treatment plant units to be located in a 100-year floodplain unless the plant unit is protected from inundation and damage that may occur during the flood event. 30 TAC § 309.13(a). The draft permit includes Other Requirement Number 6, which requires NASH to provide protection for the Facility from a 100-year flood. Moreover, the ED provided a comparison to a real-life example to show how the proposed discharged could impact water levels in the creek. The proposed final phase permitted flow, 1,000,000 gallons per day, is similar to twenty-six standard water hoses (5/8 inch x 50 feet) operating at 60 pounds per square inch. This would be the equivalent of a stream flow of 1.5 cubic feet per second. The ED has made a preliminary determination that the final phase permitted flow of 1,000,000 gallons per day is not expected to cause any adverse impact on the receiving stream. To the extent this issue is referred to SOAH, NASH respectfully requests that it be described as follows: "Whether the application complies with TCEQ regulations at 30 TAC § 309.13(a) regarding facility protection from a 100-year flood event."

2. Effects on Property Values (ED's RTC No. 2)

Ms. Domahidi and Mr. Spicer commented that the proposed wastewater treatment facility would impact their property values. As the ED notes in its RTC, TCEQ does not have jurisdiction over property value issues. Consequently, this issue is not a relevant or material issue for consideration at a contested case hearing in this matter.

3. Proximity to another Wastewater Treatment Facility (ED's RTC No. 3)

Mr. Riley expressed concern about the Facility's proximity to another permitted discharge facility and Mr. Spicer commented that there is no need for the proposed Facility because of the other permitted discharge facility. Ms. Domahidi requested moving the Facility somewhere else because of its proximity to another permitted discharge Facility. The Texas Water Code Section 26.0282 provides that the Commission may deny or alter the terms and conditions of a draft permit based on consideration of need, including the expected volume and quality of influent and the availability of existing proposed area-wide or regional waste collection treatment and disposal systems not designated as area wide or regional disposal systems by Commission Order. As required by the permit application, NASH reviewed the three-mile area surrounding the proposed Facility to determine whether there was a wastewater treatment plant within the area with the capacity to accept the additional wastewater NASH proposes to treat. Although NASH's review indicated that there were other wastewater treatment facilities within the three-mile radius, none of the facilities has the capacity or willingness to expand to accept the volume of wastewater proposed in the NASH Application. As explained in the ED's RTC, TCEQ's administrative and technical review of wastewater discharge applications only considers whether the discharge route and plant site proposed as presented in the application comply with Texas law. Consequently, the fact that other wastewater treatment

plants exist within the vicinity of the proposed Facility is not a relevant or material issue for issuance of this TPDES permit.

4. Private and Public Nuisance (ED's RTC No. 4)

Mr. Spicer commented that the Facility would affect his enjoyment of his property and could possibly justify a public and private nuisance claim. As pointed out in the RTC, TCEQ does not have jurisdiction to address public and private nuisance claim issues. The issuance of the permit would not preclude landowners from seeking common law remedies for trespass, nuisance, or other causes of action in the courts, but the possibility of private or public nuisance claims is not a relevant or material issue for TCEQ's issuance of this permit.

5. Potential Air Pollutant Impacts/Odor Issues (ED's RTC No. 5)

Mr. Spicer expressed concern that the draft permit would push air pollutants into his neighborhood. The wind rose diagram in the Application shows that the primary wind direction at the proposed Facility is from the southeast to the northwest. Mr. Spicer's property and the other requesters' properties are located southwest of proposed Facility. Thus, the prevailing wind direction at the Facility would be away from Mr. Spicer's property.

Further, Commission regulations require the permit holder to establish buffer zones or an odor control plan for abating nuisance odor. For this permit, the 150-buffer zone requirement would be met by NASH by owning the required buffer zone area and right-of-way into Beckendorff Road. All of the hearing requesters' properties are far beyond the 150-foot buffer zone for this Facility, as demonstrated on Attachment A, which depicts the nearest point of the property line for each requester to the Facility. Consequently, it is NASH's position that this is not a material issue for consideration regarding issuance of this permit. Nevertheless, if the Commission chooses to refer this issue, Applicant respectfully recommends that the issue be

described as follows: “Whether the proposed Facility will meet the applicable requirements of 30 TAC § 309.13(e).”

6. Potential Groundwater Pollution (ED’s RTC No. 6)

Ms. Domahidi expressed concern that the treated effluent would cause a flood and would contaminate local water wells. The ED’s RTC treated this issue as a water quality concern. Applicant disagrees. For properly constructed water wells, there is virtually no opportunity for commingling with surface water. The requirement in a TPDES permit application involving water wells is an offset requirement for the wastewater treatment plant unit of 250 feet from a private water well. 30 TAC § 309.13(c). The Application demonstrates that the proposed Facility will far exceed this offset requirement. Based upon the distances from the nearest property lines to the Facility as shown on Attachment A, it is NASH’s position that this issue is not one that is material to consideration regarding permitting in this case. Nevertheless, if the Commission decides to refer this issue to SOAH, Applicant respectfully requests that the issue be framed as follows: “Whether the proposed wastewater treatment plant will meet the appropriate separation distance from private water wells specified in 30 TAC § 309.13(c).

**V. MAXIMUM DURATION OF HEARING**

Should the Commission decide to refer this case to SOAH for a hearing, given the limited number and scope of issues Applicant believes may be appropriate in this case, the maximum expected duration of a hearing on this application and draft permit should be no longer than six months from the first date of the preliminary hearing until the proposal for decision is issued.

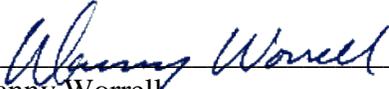
**VI. CONCLUSION**

For the reasons set forth above, NASH respectfully requests that the Commission deny Protestants’ hearing requests, not refer this matter for a contested case hearing, and issue NASH FM 529, LLC Permit No. WQ0015264001. Should the Commission decide to grant the

Protestants' hearing requests, Applicant respectfully requests that the Commission limit the issues addressed in the contested case hearing to only those that the Commission determines to be relevant and material to this Application as we have identified herein and for the duration specified above.

Respectfully submitted,

KATTEN MUCHIN ROSENMAN LLP  
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Austin, Texas 78701  
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Facsimile: (512) 691-4001

By:  \_\_\_\_\_  
Danny Worrell  
State Bar No. 22002000  
Sara M. Burgin  
State Bar No. 13012470

ATTORNEYS FOR NASH FM 529, LLC

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of Applicant's Response to Hearing Requests has been sent via Certified Mail, Return Receipt Requested, to the following parties of record in this case on June 8, 2015.

**FOR THE EXECUTIVE DIRECTOR**

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**REQUESTERS**

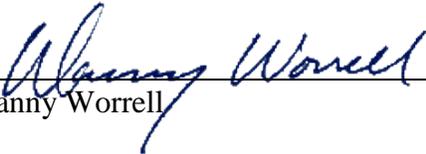
Carrick Brooke-Davidson  
Guida Slavich & Flores PC  
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Hanelore Domahidi  
23810 Stockdick School Rd.  
Katy, TX 77493-6318

James W. Riley  
23826 Stockdick School Rd.  
Katy, TX 77493-6318

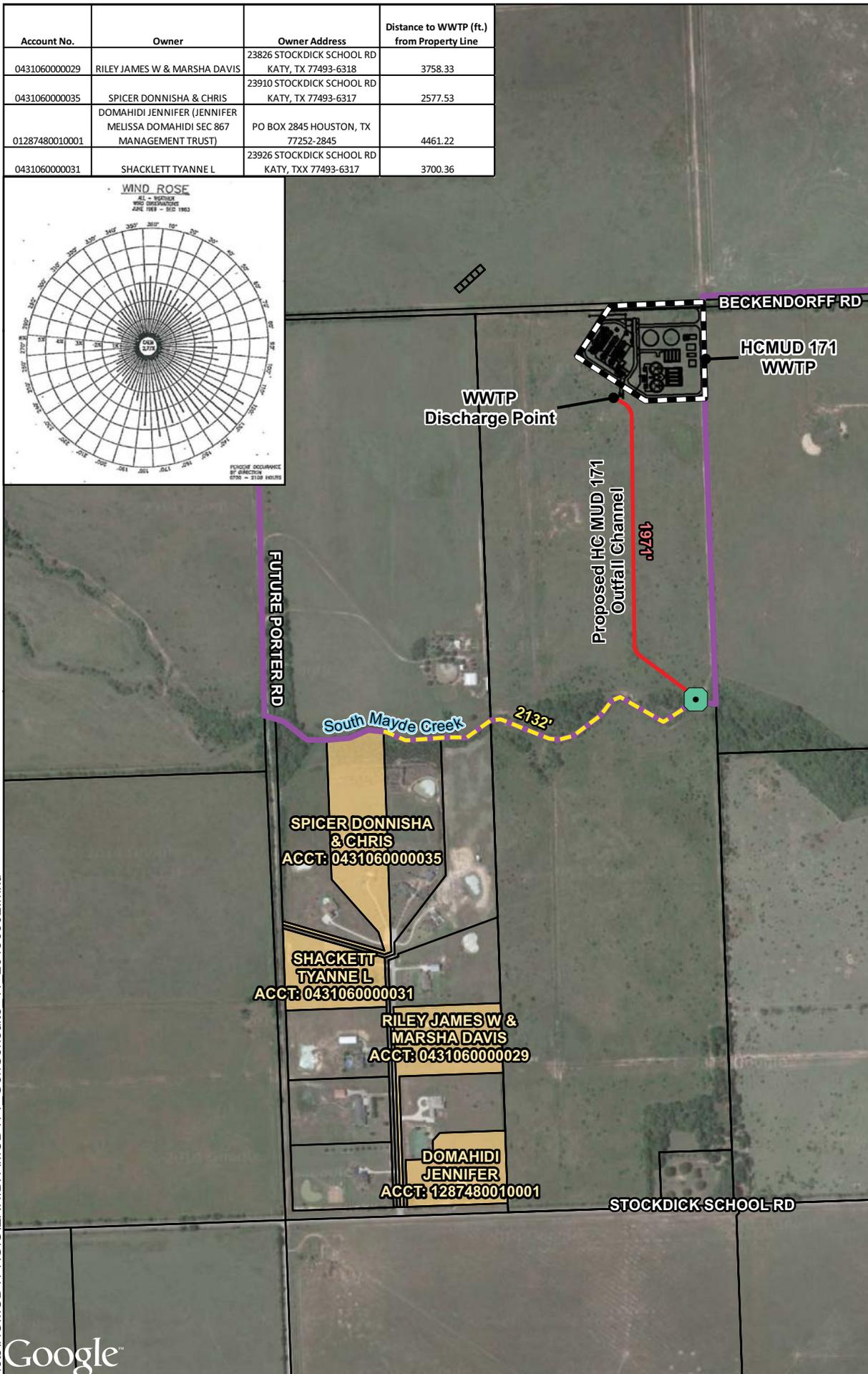
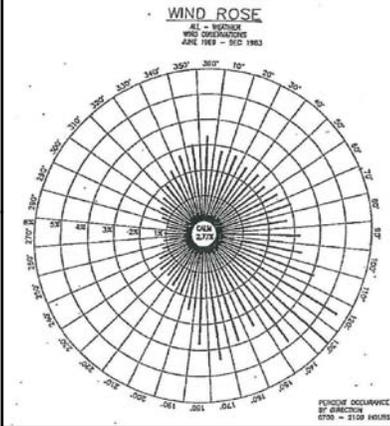
Thomas Shacklett  
Alarm One  
23926 Stockdick School Rd.  
Katy, TX 77493-6317

Christopher L. Spicer  
23910 Stockdick School Rd.  
Katy, TX 77493-6317

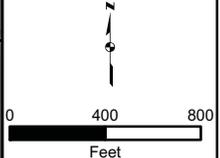
  
\_\_\_\_\_  
Danny Worrell



Account No.	Owner	Owner Address	Distance to WWTP (ft.) from Property Line
0431060000029	RILEY JAMES W & MARSHA DAVIS	23826 STOCKDICK SCHOOL RD KATY, TX 77493-6318	3758.33
0431060000035	SPICER DONNISHA & CHRIS	23910 STOCKDICK SCHOOL RD KATY, TX 77493-6317	2577.53
01287480010001	DOMAHIDI JENNIFER (JENNIFER MELISSA DOMAHIDI SEC 867 MANAGEMENT TRUST)	PO BOX 2845 HOUSTON, TX 77252-2845	4461.22
0431060000031	SHACKLETT TYANNE L	23926 STOCKDICK SCHOOL RD KATY, TX 77493-6317	3700.36



- Point Where Discharge Enters South Mayde Creek
- Wastewater Treatment Plant (WWTP)
- Proposed Man-made Channel
- WWTP Site Boundary
- Harris County MUD 171
- Parcel (HCAD)
- Parcels Requesting Contested Case Hearing



Disclaimer:  
Every effort has been made to ensure the accuracy of the basemap data. Brown & Gay Engineers, Inc. assumes no liability or damages due to errors or omissions.

Date: June 2015 Job No: 2873-00

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# Hearing Requestor's Properties Map