TCEQ AIR QUALITY PERMIT NUMBERS 122733
TCEQ DOCKET NUMBER 2015-1489-AIR

APPLICATION BY	**§**	**BEFORE THE**
HALYARD ENERGY	**§**	
HENDERSON, LLC	**§**	**TEXAS COMMISSION ON**
HALYARD HENDERSON	**§**	
ENERGY CENTER	**§**	**ENVIRONMENTAL QUALITY**
LARUE, HENDERSON COUNTY	**§**	

EXECUTIVE DIRECTOR'S RESPONSE TO REQUESTS FOR RECONSIDERATION AND HEARING REQUESTS

The Executive Director (ED) of the Texas Commission on Environmental Quality (commission or TCEQ) files this response (Response) to the requests for reconsideration and requests for a contested case hearing submitted by persons listed herein regarding the above-referenced matter. The Texas Clean Air Act (TCAA), Texas Health & Safety Code (THSC) § 382.056(n), requires the commission to consider hearing requests in accordance with the procedures provided in Tex. Water Code (TWC) § 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 plant 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 have been filed as backup material for the commissioners' agenda. The ED's 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

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

This permit will authorize the Applicant to construct an electric generating unit. The Applicant provided the following driving directions: from the intersection of Texas Farm-to-Market Road 2588 and County Road 4402, drive 0.3 miles west on County Road 4402; the site will be on the right. The location is near Larue in Henderson County. Contaminants authorized under this permit include organic compounds, nitrogen oxides (NO_X), carbon monoxide (CO), sulfur dioxide (SO_2), sulfuric acid mist

[1] Statutes cited in this response may be viewed online at www.statutes.legis.state.tx.us. Relevant statutes are found primarily in the THSC and the TWC. The rules in the Texas Administrative Code may be viewed online at www.sos.state.tx.us/tac/index.shtml, or follow the "Rules" link on the TCEQ website at www.tceq.texas.gov.

(H_2SO_4), particulate matter (PM), including PM with diameters of 10 microns or less (PM_{10}) and 2.5 microns or less ($PM_{2.5}$) and hazardous air pollutants. The compliance history rating for Halyard is Unclassified. The TCEQ Enforcement Database was searched, and no enforcement activities were found that are inconsistent with the compliance history.

Before work begins on the construction of a new facility that may emit air contaminants, the person planning the construction must obtain a permit from the commission. This permit application is for an initial issuance of Air Quality Permit Number 122733. The permit application was received on August 14, 2014 and declared administratively complete on August 25, 2014. The Notice of Receipt and Intent to Obtain an Air Quality Permit (NORI or first public notice) for this permit application was published in English on September 4, 2014 in the *Athens Daily Review*. The Notice of Application and Preliminary Decision for an Air Quality Permit (NAPD) and the notice of public meeting were published on April 15, 2015 in English in the *Athens Daily Review*. A public meeting was held on April 23, 2015 in Larue. The public comment period ended on May 15, 2015. The ED's Response to Public Comment (RTC) was mailed on August 24, 2015 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 a contested case hearing. The cover letter attached to the RTC included information about making requests for a contested case hearing or for reconsideration of the ED's decision.[2] The letter also explained that 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.

The time for requests for reconsideration and hearing requests ended on September 23, 2015. The TCEQ received timely requests for reconsideration from Shannon Decraene as President of King's Rein, Sandra Bunch as Treasurer of King's Rein, and Norma Mullican as Secretary of King's Rein. The requests for reconsideration were submitted in a single letter (the King's Rein letter) with the three requesters listed as signatories. The TCEQ received timely hearing requests during the public comment period that were not withdrawn from the following persons: Shannon Decraene and Carson Shultz.

II. Applicable Law for Requests for Reconsideration

The commission must assess the timeliness and form of the requests for reconsideration, as discussed in Section I above. The form requirements for responses are set forth in 30 TAC § 55.209(f), which states, "Responses to requests for reconsideration should address the issues raised in the request."

[2] See TCEQ rules at 30 TAC Ch. 55, subch. F. Procedural rules for public input to the permit process are found primarily in chapters 39, 50, 55, and 80 of Title 30 of the TAC.

III. Response to Requests for Reconsideration

Each of the requests for reconsideration address responses in the ED's RTC filed on August 20, 2015. The King's Rein letter requested reconsideration of Responses 1 and 2 of the RTC.

REQUEST FOR RECONSIDERATION OF RESPONSE 1:
The King's Rein letter expressed concern that the margin of safety was only "adequate" and not "good, excellent, [or] above standard." The requesters stated that the participants in the equine therapy program would not feel confident that they will not experience potential harmful effects from the plant's emissions based on only an adequate margin of safety.

The letter also expressed concern about noise discharges and cited the TCEQ nuisance rule, 30 TAC § 101.4. The requesters stated that "any potential noise discharges [. . .] may affect the behavior of a horse during a session and potentially 'tend to be ***injurious*** to or ***adversely affect human health or welfare'*** of a participant/rider."

TCEQ RESPONSE:
As stated in the RTC, the specific health-based standards or guidance levels employed in evaluating the potential emissions include the National Ambient Air Quality Standards (NAAQS) and TCEQ standards found in 30 TAC Chapter 111, specifically, 30 TAC § 111.153, and 30 TAC Chapter 112. The NAAQS have been established by the EPA to provide public health protection, which includes the protection of sensitive members of the population like children and the participants in the equine therapy program.

Regarding noise discharges, as stated in the RTC, the TCEQ's jurisdiction is established by the Legislature and is limited to the issues set forth in statute. Accordingly, the TCEQ does not have jurisdiction to consider noise related issues. The nuisance rule applies only to the discharge of air contaminants or combinations of air contaminants; it does not apply to noise discharge.

REQUEST FOR RECONSIDERATION OF RESPONSE 2:
The King's Rein letter stated that the requesters' ability to generate or maintain their business and the use and enjoyment of the property will be greatly affected by the proposed power plant because the non-profit is located only ½ mile (2,640feet) from the site. Citing the TCEQ's response in the RTC, "The TCEQ shall consider possible adverse health risks on individuals attending schools that are located within 3,000 feet of a facility or proposed facility," the requesters state that the primary participants in the therapy program are children.

TCEQ RESPONSE:
As stated in the RTC, TCAA § 382.052 requires the TCEQ to consider possible adverse short-term or long-term side effects of air contaminants or nuisance odors from the facility on individuals attending an elementary, junior high, or senior high school that is within 3,000 feet of the proposed facility. The requesters seem to want the TCEQ to evaluate the property as if it were a school within 3,000 feet. However, this statute only applies to schools, and the TCEQ does not have the authority to extend its provisions to other organizations.

IV. Applicable Law for Hearing Requests

The commission must assess the timeliness and form of the hearing requests, as discussed in Section I 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;
> (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 TWC § 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.

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.

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 the 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.[3] 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.[4] 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 a condition of air pollution.[5] 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.[6] The materials accompanying this response list and reference permit conditions and operational requirements and limitations applicable to this proposed facility.

V. Analysis of Hearing Requests

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

The following persons submitted timely hearing requests that were not withdrawn: Shannon Decraene and Carson Shultz.

1. Shannon Decraene
   Shannon Decraene timely submitted a hearing request on September 29, 2014. She provided her name, phone number, and residential address. She stated that the proposed power plant will most definitely interfere with her use and enjoyment of her property. She operates an equine therapy program on her farm, where people who have physical, emotional, and mental challenges as well as a variety of health issues come for therapy.

   She stated that her location is a half mile from the proposed power plant. Based on the address she provided, the ED determined that she lives within one mile from the proposed plant. She requested a contested case hearing in the first sentence of her request.

   Based on the foregoing, the ED finds that Shannon Decraene substantially complied with all of the requirements to request a contested case hearing required by 30 TAC § 55.201(d). Therefore, the ED can determine whether it is

[3] THSC § 382.0518
[4] THSC § 382.0513
[5] THSC § 382.085
[6] THSC § 382.0513

likely that the requester will be impacted differently than any other member of the general public or if the regulated activity will likely impact her interest, which will be discussed in detail in subsection B below.

2. Carson Shultz
   Carson Shultz timely submitted a hearing request on October 9, 2014. He provided his name and an address but not his telephone number. He requested a contested case hearing in the first sentence of his request. His request stated that he owns and operates a local Eco-Adventure tour. He did not identify a personal justiciable interest in his request. Rather, his request asked several questions, which were answered in the RTC. He also did not explain his location and distance relative to the proposed plant.

   Using the address Mr. Shultz provided, the ED determined that his location is more than two miles from the proposed plant location. Based on the foregoing, the ED finds that Carson Shultz did not substantially comply with all of the requirements to request a contested case hearing required by 30 TAC § 55.201(d). Therefore, the ED cannot determine whether it is likely that he will be impacted differently than any other member of the general public or if the regulated activity will likely impact his interest.

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

The law applicable to this permit application is outlined above in Section IV. The following hearing requester failed to identify any personal justiciable interest or why the requester believes he will be adversely affected by the proposed facility in a manner not common to members of the general public as required by 30 TAC § 55.201(d)(2). Therefore, pursuant to TCAA § 382.058(c), Carson Shultz is not an affected person.

Because Shannon Decraene has stated a personal justiciable interest, the commission must next consider the non-exhaustive list of factors found in 30 TAC § 55.203(c) for determining whether a person is an affected person.

First, the commission must consider whether the interest claimed is one protected by the law under which the application will be considered.

1. Shannon Decraene
   The request submitted by Shannon Decraene stated that her use and enjoyment of her property would be adversely affected by the application.

This interest is protected by the law under which the application will be issued.

The commission must consider whether a reasonable relationship exists between the interest claimed and the activity regulated. The activity the commission regulates is the

authorized emissions into the air of contaminants by a person who owns or operates a facility or facilities. Those persons who own or operate a facility or facilities are prohibited from emitting air contaminants or performing any activities that contravene the TCAA or any other commission rule or order, or that causes or contributes to air pollution. The interest of Shannon Decraene is within the scope of an air quality authorization because it focuses on the potential adverse effects of potential air contaminants from the facility, and the ED finds that a reasonable relationship exists between the interest claimed and the activity the commission regulates.

Next, the commission must consider distance restrictions or other limitations imposed by law on the affected interest, the 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 the likely impact of the regulated activity on the use of the natural resource by the person. For air authorizations, distance from the proposed facility is particularly relevant to the issue of whether there is a likely impact of the regulated activity on a person's interests because of the dispersion and effects of individual air contaminants emitted from a facility. As discussed above, the ED agrees that Shannon Decraene resides in close proximity of the footprint of the facility, which is the subject of this permit application and notes that her comments reveal concern for the use and enjoyment of her property. The natural resource that is the subject of this permit is the ambient air that she breathes, and she has indicated a manner in which emissions from the plant could impact it. The ED finds that this requester has a personal justiciable interest within the meaning of TWC § 5.115 and TAC § 55.203(a) affected by this permit application.

Because Shannon Decraene lives in close proximity to the proposed facility and has articulated a personal justiciable interest that is not common to the general public, her request satisfies the requirements for form under 30 TAC § 55.201(d), and she is an affected person under 30 TAC § 55.203.

C. Which issues in this matter should be referred to SOAH for a contested case hearing?

If the commission determines any of the hearing requests in this matter are timely and in proper form, and some or all of the hearing requesters are affected persons, the commission must apply the three-part test discussed in Section IV 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.

1. What issues are questions of fact?
    - Whether the facility will have an adverse effect on Shannon Decraene's use and enjoyment of her property.

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 September 4, 2014 and ended on May 15, 2015. 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. Are the issues relevant and material to the decision on the application?
   In this case, the permit would be issued under the commission's authority in TWC § 5.013(11) (assigning the responsibilities in THSC Chapter 382), 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 the 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.

In the absence of identification by hearing requesters of disputed issues in the RTC, the ED cannot determine which issues remain disputed. However, if the assumption is made that the issues raised in the public comments continue to be disputed, the following is the ED's position on those issues.

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

1. Whether the facility will have an adverse effect on Shannon Decraene's use and enjoyment of her property.

VI. 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.

VII. Executive Director's Recommendation

The ED respectfully recommends the commission:

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

B. 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:

1. Shannon Decraene

C. Find all other hearing requesters are not affected persons in this matter;

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

1. Whether the facility will have an adverse effect on Shannon Decraene's use and enjoyment of her property.

E. Find the maximum expected duration of the contested case hearing, if held, would be six months.

Respectfully submitted,

Texas Commission on Environmental Quality

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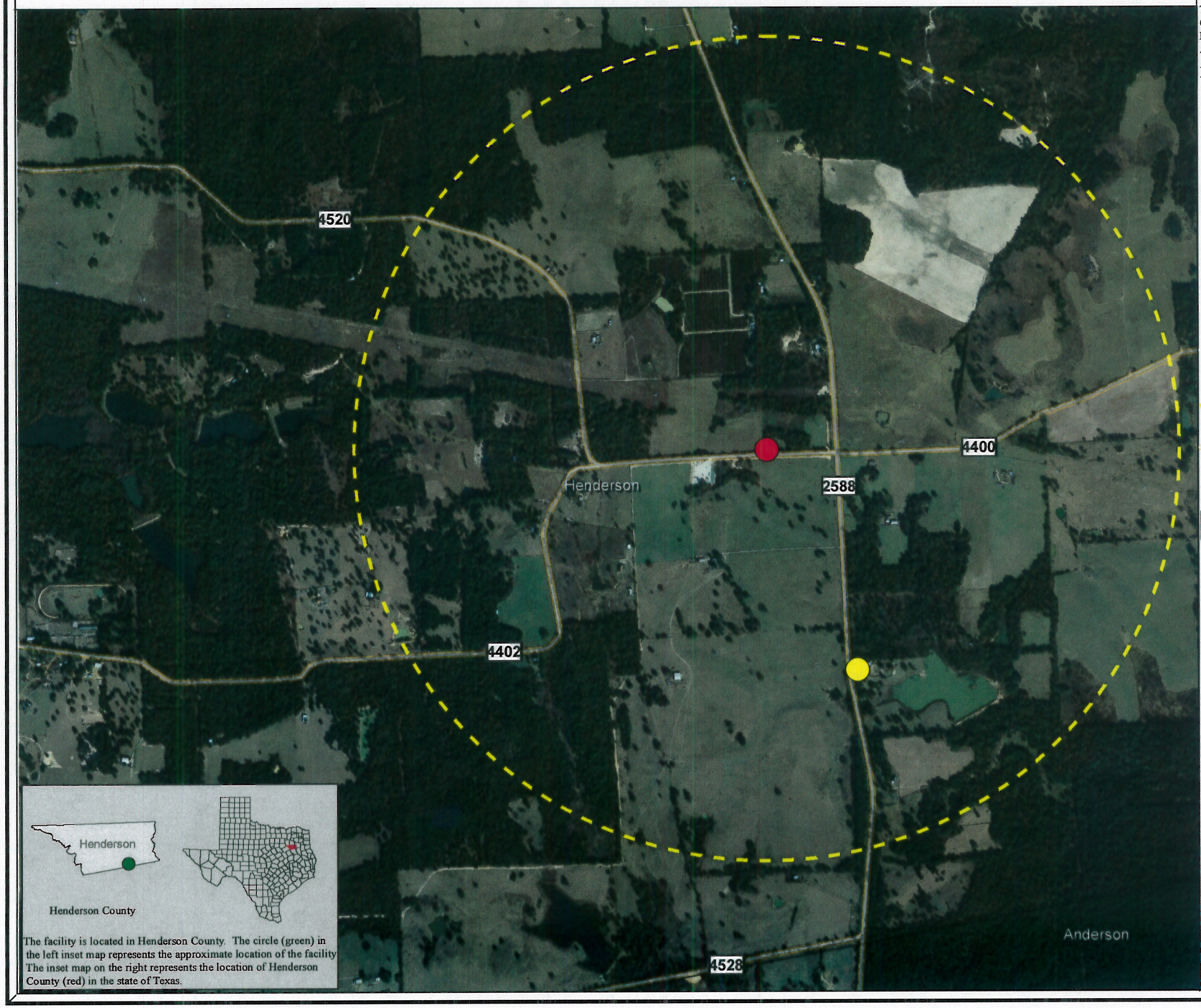
REPRESENTING THE
EXECUTIVE DIRECTOR OF THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

Halyard Energy Henderson Permit No. 122733
Hearing Requesters

Map Requested by TCEQ Office of Legal Services
for Commissioners' Agenda



The facility is located in Henderson County. The circle (green) in the left inset map represents the approximate location of the facility. The inset map on the right represents the location of Henderson County (red) in the state of Texas.

Protecting Texas by Reducing and Preventing Pollution

TCEQ

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

Date: 10/16/2015

N

0 0.2 0.4 Miles

- Facility
- Requester
- 1 mile radial distance from facility
- Intermediate Roads
- Minor Roads
- County Boundary

Requester:
Shannon Decraene

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 background imagery of this map is from the current Environmental Systems Research Institute (ESRI) map service, as of the date of this map.

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.

CRF 463074

CERTIFICATE OF SERVICE

On the 26th day of October 2015, 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.

_____
Sierra Redding

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