

DOCKET NO. 2021-1442-MWD

APPLICATION BY
Stephen Richard Selinger
FOR NEW TPDES PERMIT
NO. WQ0015932001

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BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUEST

I. Introduction

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this Response to Hearing Request (Response) on the application by Stephen Richard Selinger (Applicant) seeking a new Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0015932991 and the Executive Director's preliminary decision. The Office of the Chief Clerk received contested case hearing requests from U.S Representative Jake Ellzey¹ (Representative Ellzey), Gregory Burdette, the City of Waxahachie² (Waxahachie), the City of Ennis³ (Ennis), and the County of Ellis (the County).⁴

Attached for Commission consideration is a satellite map of the area.

II. Description of Facility

The Applicant applied for a new permit to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 405,000 gallons per day (gpd). The facility will be located approximately 3,907 feet northwest of the intersection of Getzenander Road and the railroad tracks, and approximately 2,045 feet southeast of the end of Jenkins Road, in Ellis County, Texas 75165. The proposed Waxahachie 530 Wastewater Treatment Facility (WWTF) will serve the Waxahachie 530 subdivision, located between the Cities of Waxahachie and Ennis, Texas.

Treatment units in the Interim I phase will include an equalization basin, a flow splitter, an aeration basin, a final clarifier, a combined aerobic sludge digester and storage tank, and a chlorine contact chamber. Treatment units in the Interim II phase will include an equalization basin, a flow splitter, two aeration basins, two final clarifiers, two combined aerobic sludge digesters and storage tanks, and two chlorine contact chambers. Treatment units in the Final phase will include an equalization basin, a flow splitter, three aeration basins, three final clarifiers, three combined aerobic sludge digesters and storage tanks, and three chlorine contact chambers. The facility has not been constructed.

The effluent limitations in the Interim I phase of the draft permit, based on a 30-day average, are 10 mg/l five-day biochemical oxygen demand (BOD₅), 15 mg/l total

¹ Former State Representative Ellzey was elected to Congress after the close of the comment period on this application; he represented the 10th district at the time of the request.

² David Bailey, Senior Director of Utilities for the City of Waxahachie, and Michael Scott, city manager submitted a request on behalf of the City of Waxahachie.

³ Represented by Emily W. Rodgers.

⁴ Represented by Emily W. Rodgers.

suspended solids (TSS), 126 colony forming units (CFU) or most probable number (MPN) of Escherichia coli (E. coli) per 100 ml, and 4.0 mg/l minimum dissolved oxygen (DO). The effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow. The effluent limitations in the Interim II and Final phases of the draft permit, based on a 30-day average, are 10 mg/l five-day carbonaceous biochemical oxygen demand (CBOD5), 15 mg/l TSS, 3 mg/l ammonia-nitrogen (NH3-N), 126 CFU or MPN of E. coli per 100 ml and 4.0 mg/l DO. The effluent shall contain a chlorine residual of at least 1.0 mg/l and shall not exceed a chlorine residual of 4.0 mg/l after a detention time of at least 20 minutes based on peak flow. The treated effluent will be discharged to an unnamed tributary, thence to Waxahachie Creek, thence to Bardwell Reservoir in Segment No. 0815 of the Trinity River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed tributary and intermediate aquatic life for Waxahachie Creek. The designated uses for Segment No. 0815 are primary contact recreation, public water supply, and high aquatic life use.

In accordance with 30 Texas Administrative Code § 307.5 and TCEQ's Procedures to Implement the Texas Surface Water Quality Standards (June 2010), an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Waxahachie Creek, which has been identified as having intermediate aquatic life use. Existing uses will be maintained and protected. The preliminary determination can be reexamined and may be modified if new information is received.

Segment No. 0815 is currently listed on the State's inventory of impaired or threatened waters (the 2020 Clean Water Act § 303(d) list). The listing is for sulfate in water throughout the entire segment (Assessment Unit 0815_01). Effluent limits or monitoring and reporting for levels of sulfate are not included in the draft permit. The discharge from this permit action is not expected to have an effect on any federal endangered or threatened aquatic or aquatic-dependent species or proposed species or their critical habitat. This determination is based on the United States Fish and Wildlife Service's (USFWS) biological opinion on the State of Texas authorization of the TPDES (September 14, 1998; October 21, 1998, update). To make this determination for TPDES permits, TCEQ and the U.S. Environmental Protection Agency (EPA) considered aquatic or aquatic-dependent species occurring in watersheds of critical concern or high priority as listed in Appendix A of the USFWS biological opinion. The determination is subject to reevaluation due to subsequent updates or amendments to the biological opinion. The permit does not require EPA review with respect to the presence of endangered or threatened species.

III. Procedural Background

The TCEQ received the application on October 1, 2020, and declared it administratively complete on December 3, 2020. The Executive Director completed the technical review and prepared the proposed permit. The Applicant published the Notice of Receipt of application and Intent to Obtain a Water Quality Permit (NORI) in the

Waxahachie Daily Light newspaper on December 9, 2020, and in Spanish in the *La Prensa Comunidad* newspaper on December 8, 2020. The Applicant published the Notice of Application and Preliminary Decision (NAPD) in the *Waxahachie Daily Light* newspaper on June 6, 2021 and in Spanish in *La Prensa Comunidad* newspaper on June 8, 2021. The public comment period closed on July 8, 2021, and the Executive Director's Response to Comments was filed on September 10, 2021. The hearing request period ended on October 14, 2021, and eight timely hearing requests were received. This application was filed on or after September 1, 2015; therefore, it is subject to the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, (1999) and Senate Bill 709, 84th Legislature (2015), which are implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55.

IV. The Evaluation Process for Hearing Requests

House Bill 801 established statutory procedures for public participation in certain environmental permitting proceedings, specifically regarding public notice and public comment and the Commission's consideration of hearing requests. Senate Bill 709 revised the requirements for submitting public comment and the Commission's consideration of hearing requests. The evaluation process for hearing requests is as follows:

A. Response to Requests

The Executive Director, the Public Interest Counsel, and the Applicant may each submit written responses to hearing requests. 30 TAC § 55.209(d).

Responses to hearing requests must specifically address:

- whether the requestor is an affected person;
- which issues raised in the hearing request are disputed;
- whether the dispute involves questions of fact or of law;
- whether the issues were raised during the public comment period;
- 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 Executive Director's Response to Comment;
- whether the issues are relevant and material to the decision on the application; and
- a maximum expected duration for the contested case hearing.

30 TAC § 55.209(c).

B. Hearing Request Requirements

In order for the Commission to consider a hearing request, the Commission must first determine whether the request meets certain requirements:

Affected persons may request a contested case hearing. The request must be made in writing and timely filed with the chief clerk. The request must be based only on the requestor's timely comments and may not be based on an issue that was raised solely in a public comment that was withdrawn by the requestor prior to the filing of the Executive Director's Response to Comment.

30 TAC § 55.201(c).

A hearing request must substantially comply with the following:

give the time, 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;

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;

request a contested case hearing; and

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; and provide any other information specified in the public notice of application.

30 TAC § 55.201(d).

C. Requirement that Requestor be an Affected Person/"Affected Person" Status

In order to grant a contested case hearing, the Commission must determine that a requestor is an "affected" person. 30 TAC § 55.203 sets out who may be considered an affected person. For any application, 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. Except as provided by 30 TAC § 55.103, governmental entities, including local governments and public agencies with authority under state law over issues raised by the application may be considered affected persons.

In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:

whether the interest claimed is one protected by the law under which the application will be considered;

distance restrictions or other limitations imposed by law on the affected interest;

whether a reasonable relationship exists between the interest claimed and the activity regulated;

likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;

likely impact of the regulated activity on use of the impacted natural resource by the person;

whether the requestor timely submitted comments on the application which were not withdrawn; and

for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203.

In making affected person determinations, the commission may also consider, to the extent consistent with case law:

the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance;

the analysis and opinions of the Executive Director; and

any other expert reports, affidavits, opinions, or data submitted by the Executive Director, the applicant, or hearing requestor.

30 TAC § 55.203(d).

D. Referral to the State Office of Administrative Hearings

“When the Commission grants a request for a contested case hearing, the commission shall issue an order specifying the number and scope of the issues to be referred to SOAH for a hearing.” 30 TAC § 50.115(b). The Commission may not refer an issue to SOAH for a contested case hearing unless the Commission determines that the issue:

involves a disputed question of fact or a mixed question of law and fact;

was raised during the public comment period by an affected person whose hearing request is granted; and

is relevant and material to the decision on the application.

30 TAC § 50.115(c).

V. Analysis of the Requests

The Executive Director has analyzed the hearing requests to determine whether they comply with Commission rules, if the requestors qualify as affected persons, what issues may be referred for a contested case hearing, and what is the appropriate length of the hearing.

A. Whether the Hearing Request Complied with Section 55.201(c) and (d).

U.S Representative Jake Ellzey⁵ (Representative Ellzey), Gregory Burdette, the City of Waxahachie⁶ (Waxahachie), the City of Ennis⁷ (Ennis), and the County of Ellis⁸ (the County) submitted timely hearing requests that raised issues presented during the public comment period that have not been withdrawn. They provided their names, addresses, email addresses, and requested a public hearing. They identified themselves as persons with what they believed to be personal justiciable interests affected by the application, which will be discussed in greater detail below, and provided a list of disputed issues of fact they raised during the public comment period. Therefore, the Executive Director concludes that the hearing requests of Representative Ellzey, Mr. Burdette, Waxahachie, Ennis, and the County substantially comply with the section 55.201(c) and (d) requirements.

The City of Waxahachie, the City of Ennis, and the County of Ellis submitted additional hearing requests in response to the Executive Director's Response to Comments. The hearing request period ended October 14, 2021, but these requests were received by the TCEQ's Chief Clerk's Office on October 15, 2021 and were therefore untimely. As a result, the Executive Director did not analyze these requests. Whether the requestors meet the affected person requirements.

1. The City of Waxahachie

According to the information provided, the proposed facility will be located outside of Waxahachie's city limits. Waxahachie stated that its wastewater treatment plant discharge point is less than three miles upstream from Applicant's proposed facility location. Applicant requested service from Waxahachie but stated he did not receive a response. Waxahachie raised concerns about the additional discharge impairing Lake Bardwell, which is its sole drinking water source, and specifically noted concerns about the Lake Bardwell sulfate impairment. Waxahachie also raised concerns about compliance with antidegradation rules, regionalization, and whether the draft permit contains adequate provisions to protect water quality. Waxahachie has a duty to protect the water quality of its drinking water supply. Waxahachie demonstrated that it had a

⁵ Former Texas State Representative Jake Ellzey was elected to Congress after the close of the comment period on this application; he represented the 10th district at the time of the request.

⁶ David Bailey, Senior Director of Utilities for the City of Waxahachie, and Michael Scott, city manager submitted a request on behalf of the City of Waxahachie.

⁷ Represented by Emily W. Rodgers.

⁸ Represented by Emily W. Rodgers.

personal justiciable interest not common to members of the public; therefore, Waxahachie is an affected person.⁹

The Executive Director recommends the Commission find that the City of Waxahachie is an affected person. Waxahachie raised issues 1-5 in its hearing request.

2. The City of Ennis

According to the information provided, the proposed discharge will flow through the city limits of Ennis. Ennis also operates a wastewater treatment plant approximately 7.2 miles from Applicant's proposed discharge point and offered to provide services to Applicant. Ennis raised concerns about the effect of the discharge on Lake Bardwell, which is its sole drinking water source. Ennis is also concerned about compliance with antidegradation rules, regionalization, Applicant's ability to operate the facility, and water quality. Ennis's concerns about water quality, antidegradation, and regionalization are protected by the law under which the application will be considered. Ennis has an interest in protecting the quality of the drinking water source for its citizens, which is an interest affected by the application not common to members of the general public. Because Ennis has authority under state law over the issues contemplated by the application, it has an interest not common to the general public. Thus, Ennis demonstrated that it has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application not common to members of the general public and is an affected person.¹⁰

The Executive Director recommends the Commission find that the City of Ennis is an affected person. Ennis raised issues 1-5 in its hearing request.

3. U.S. Representative Jake Ellzey

According to the information provided by Representative Ellzey, he represented the area the proposed facility will be located. However, there is not a statute that allows members of the legislature to request contested case hearings solely on their status as a legislative member. Representative Ellzey raised general concerns and did not show he was an affected person in his individual capacity.¹¹ Representative Ellzey's concerns suggest he has an interest common to the general public. Therefore, Representative Ellzey failed to show he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application not common to members of the general public and is not an affected person.¹²

The Executive Director recommends the Commission find that Representative Ellzey is not an affected person.

⁹ 30 Tex. Admin. Code § 55.203(3)(a); *see also id.* § 55.211(c)(2).

¹⁰ *Id.* § 55.203(a); *see also id.* § 55.211(c)(2) (addressing hearing requests from affected persons that will be granted).

¹¹ *Id.* § 55.203(3)(e).

¹² *Id.* § 55.203(a); *see also id.* § 55.211(c)(2).

4. The County of Ellis

According to the information provided by the County, the proposed facility will be located within its jurisdictional bounds. The County raised concerns about the discharge's effect on water quality in Lake Bardwell, emerging contaminants, the Applicant's experience as a facility and system operator, compliance with the State's regionalization policy, and whether the draft permit terms comply with applicable water quality standards.¹³ Neither the Texas Water Code nor other applicable statutes give the County standing solely based on its status as a county, and the County did not demonstrate how it was an affected person on an individual basis. Although the County is a governmental entity under 30 TAC § 55.203(c)(7), the County has not demonstrated that it has statutory authority over or interest in the issues relevant to this application.¹⁴

The Executive Director recommends the Commission find that Ellis County is not an affected person.

5. Gregory Burdette

According to the information provided by Mr. Burdette, his property is 8.22 miles from the facility. He raised concerns about erosion and potential impact to property values. Mr. Burdette's concerns about erosion and property values are not protected by the law under which the application will be considered and thus are not referable.¹⁵ Therefore, Mr. Burdette does not have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application not common to members of the general public and is not an affected person.¹⁶

The Executive Director recommends the Commission find that Mr. Burdette is not an affected person.

B. Whether Issues Raised Are Referable to SOAH for a Contested Case.

The Executive Director analyzed the issues raised in the hearing request it has recommended granting in accordance with the regulatory criteria and provides the following recommendations regarding whether the issues can be referred to SOAH if the Commission grants the hearing requests. All issues were raised during the public comment period, and none of the issues were withdrawn. All identified issues are considered disputed unless otherwise noted.

1. Whether issuance of the draft permit is contrary to the state's regionalization policy or Texas Water Code § 26.0282. (RTC Response No. 4).

The issue involves a disputed question of mixed fact and law, was raised during the comment period, was not withdrawn, and is relevant and material to the issuance of the draft permit. If it can be shown the draft permit does not comply with the state's regionalization policy under Texas Water Code § 26.0282, that information

¹³ *Id.* § 55.203(3)(e).

¹⁴ *Id.* § 55.203(a); *see also id.* § 55.211(c)(2).

¹⁵ *Id.* § 55.203(3)(e).

¹⁶ *Id.* § 55.203(a); *see also id.* § 55.211(c)(2).

would be relevant and material to a decision on the application. The Executive Director recommends referring this issue to SOAH.

2. Whether the Commission should deny or alter the terms and conditions of the draft permit based on the consideration of need under Texas Water Code § 26.0282. (RTC Response Nos. 1 and 4).

The issue involves a disputed question of mixed fact and law, was raised during the comment period, was not withdrawn, and is relevant and material to the issuance of the draft permit. If it can be shown the draft permit does not substantially comply with Texas Water Code § 26.0282, that information would be relevant and material to a decision on the application. The Executive Director recommends referring this issue to SOAH.

3. Whether the draft permit contains adequate provisions to protect water quality, including the water quality in Lake Bardwell. (RTC Response Nos. 2, 5, and 6).

The issue involves a disputed question of mixed fact and law, was raised during the comment period, was not withdrawn, and is relevant and material to the issuance of the draft permit. If it can be shown the draft permit does not provide sufficient controls to protect water quality, that information would be relevant and material to a decision on the application. The Executive Director recommends referring this issue to SOAH.

4. Whether the Applicant's ability to operate the facility and comply with its permit warrant altering or denying the terms of the permit. (RTC Response No. 1).

The issue involves a disputed question of mixed fact and law, was raised during the comment period, was not withdrawn, and is relevant and material to the issuance of the draft permit. If it can be shown that the Applicant will be unable to operate the facility in compliance with material terms of the permit, that information would be relevant and material to a decision on the application. The Executive Director recommends referring this issue to SOAH.

5. Whether the draft permit complies with applicable TPDES effluent guidelines and TSWQS. (RTC Response No. 6).

The issue involves a disputed question of mixed fact and law, was raised during the comment period, was not withdrawn, and is relevant and material to the issuance of the draft permit. If it can be shown that the draft permit does not comply with effluent guidelines as required by statute, that information would be relevant and material to a decision on the application. The Executive Director recommends referring this issue to SOAH.

6. Whether the draft permit adequately considers emerging contaminants. (RTC Response No. 5).

This is an issue of fact; however, it is not relevant and material to a decision on the application, as current statutes and regulations do not address emerging contaminants. The Executive Director does NOT recommend referring this issue to SOAH.

7. Whether the draft permit will contribute to erosion. (RTC Response No. 3).

This is an issue of fact. However, it is not relevant and material to a decision on the application, as the TCEQ does not have jurisdiction over erosion. The Executive Director does NOT recommend referring this issue to SOAH.

VI. Contested Case Hearing Duration

If there is a contested case hearing on this application, the Executive Director recommends that the duration of the hearing be 180 days from the preliminary hearing to the presentation of a Proposal for Decision to the Commission.

VII. Conclusion

The Executive Director recommends the following actions by the Commission:

Find the City of Ennis and the City of Waxahachie as affected persons and grant their hearing requests;

Refer the following issues to SOAH:

Issue 1. Whether issuance of the draft permit is contrary to the state's regionalization policy or Texas Water Code § 26.0282

Issue 2. Whether the Commission should deny or alter the terms and conditions of the draft permit based on the consideration of need under Texas Water Code § 26.0282.

Issue 3. Whether the draft permit is protective of surface and groundwater quality in Lake Bardwell.

Issue 4. Whether the Applicant's ability to operate the facility and comply with its permit warrant altering or denying the terms of the permit.

Issue 5. Whether the draft permit complies with applicable TPDES effluent guidelines and TSWQS.

Find U.S Representative Jake Ellzey, Gregory Burdette, and the County of Ellis are not affected persons and deny their hearing requests.

Respectfully submitted,

Texas Commission on Environmental Quality

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Executive Director

Erin. E. Chancellor, Director
Environmental Law Division

Guy Henry, Acting Deputy Director
Environmental Law Division



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REPRESENTING THE EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

VIII. CERTIFICATE OF SERVICE

I certify that on December 13, 2021, the “Executive Director’s Response to Hearing Request” for new TPDES Permit No. WQ0015932001 by Stephen Richard Selinger was filed with the TCEQ’s Office of the Chief Clerk, and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, electronic submittal, or by deposit in the U.S. Mail.



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REQUESTORS/INTERESTED PERSONS

See attached list.

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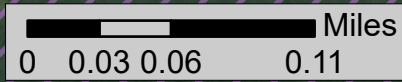
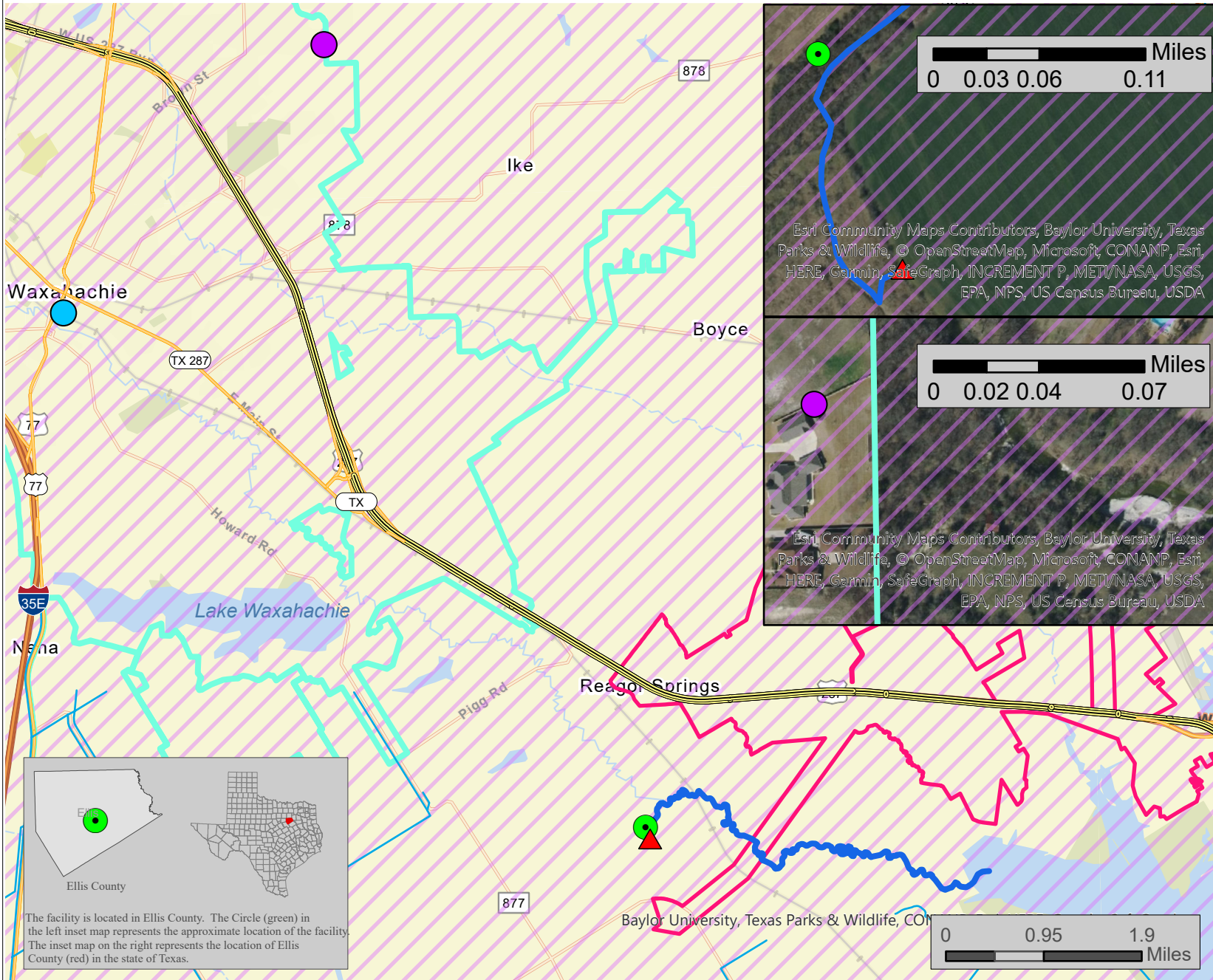
TPDES Permit No. WQ0015932001

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

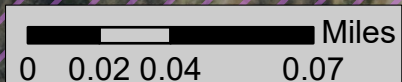


Protecting Texas by
Reducing and
Preventing Pollution

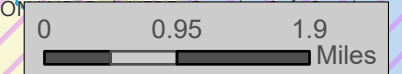
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Date: 11/15/2021
CRF 0060493
Cartographer: ABanda



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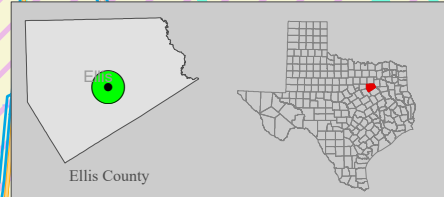
- Gregory Burdette
- David Bailey
- ▲ Wastewater Outfalls
- Facility
- Water CCN
- Sewer CCN
- Discharge Route
- City of Ennis
- City of Waxahachie
- District Ten

U.S Representative Jake Ellzey
represented House District 10.

Requestor Gregory Burdette
is 8.22 miles from the facility.

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.

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.



The facility is located in Ellis 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 Ellis County (red) in the state of Texas.