

Lori Rowe

From: PUBCOMMENT-OCC
Sent: Wednesday, February 23, 2022 9:25 AM
To: PUBCOMMENT-OCC2; PUBCOMMENT-OPIC; PUBCOMMENT-ELD; PUBCOMMENT-WQ
Subject: FW: Public comment on Permit Number WQ0016017001
Attachments: D Norwood Hearing Request on Star Harbor TLAP WQ0016017001 DRAFT 02.22.2022.pdf

H

From: dgalvan@lglawfirm.com <dgalvan@lglawfirm.com>
Sent: Tuesday, February 22, 2022 2:24 PM
To: PUBCOMMENT-OCC <PUBCOMMENT-OCC@tceq.texas.gov>
Subject: Public comment on Permit Number WQ0016017001

REGULATED ENTY NAME STAR HARBOR WWTP

RN NUMBER: RN111296158

PERMIT NUMBER: WQ0016017001

DOCKET NUMBER:

COUNTY: HENDERSON

PRINCIPAL NAME: CITY OF STAR HARBOR

CN NUMBER: CN600631246

FROM

NAME: Dubelza Galvan

E-MAIL: dgalvan@lglawfirm.com

COMPANY: Lloyd Gosselink

ADDRESS: 816 CONGRESS AVE Ste. 1900
AUSTIN TX 78701-2442

PHONE: 5123225824

FAX:

COMMENTS: D. Norwood Hearing Request.



816 Congress Avenue, Suite 1900
Austin, Texas 78701
512.322.5800 p
512.472.0532 f
lglawfirm.com

Mr. Aldredge's Direct Line: (512) 322-5859
jaldredge@lglawfirm.com

February 22, 2022

Ms. Laurie Gharis, Chief Clerk
Office of the Chief Clerk (MC-105)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

VIA ELECTRONIC FILING AND
FIRST-CLASS MAIL

Re: Application by the City of Star Harbor for TLAP No. WQ0016017001
Hearing Request by Don Norwood

Dear Ms. Gharis:

On behalf of individual landowner Don Norwood, I respectfully file this request for a contested case hearing on the above-referenced application ("Application"). This letter is in furtherance to Mr. Norwood's public comments submitted in my previous letter dated November 15, 2021 on behalf of both Mr. Norwood and Castell Realty LLC. By this reference, I hereby incorporate the November 15, 2021 letter and all comments as if set forth expressly in this letter. My fax number is 512-472-0532.

For reasons explained in the November 15, 2021 comment letter, Mr. Norwood has a personal justiciable interest related to legal property rights that is affected by the Application. Specifically, Don Norwood owns property, including private domestic groundwater wells and surface water features, immediately adjacent to the proposed permitted facilities, including the wastewater treatment plant and effluent storage lagoon identified in Application Attachment 4. In fact, Attachment 4 illustrates that a portion of the proposed storage lagoon will encroach onto Mr. Norwood's property. Consequently, the relative distance between Mr. Norwood's legal rights and interests and the proposed facility as identified in the Application is effectively zero. Those legal rights and interests will be affected by the proposed facility and activity in a manner not common to members of the general public because TCEQ's authorization of the same will effectively authorize Star Harbor to trespass onto Mr. Norwood's property and will severely impair Mr. Norwood's enjoyment and use of his property.

Mr. Norwood disputes the following relevant and material issues of fact, all of which were raised by Mr. Norwood in my November 15, 2021 comment letter.

- Public notice of the Application is deficient because the Chief Clerk failed to mail notice to all required persons.
- The Landowner Map attached to the Application misidentifies property boundaries and fails to properly identify Mr. Norwood as an owner of property adjacent to the property on which Star Harbor proposes to construct its facility.

- The Chief Clerk's Notice of Application and Preliminary Decision for Water Quality Land Application Permit for Municipal Wastewater and the Executive Director's Preliminary Decision both incorrectly state that the "wastewater treatment facility and disposal site will be located in the drainage basin of Cedar Creek Reservoir in Segment No. 0818 of the Trinity River Basin." As illustrated in the USGS Topographic Map included as Attachment 15 to the Application, the treatment facility is proposed to be located in the Cedar Creek watershed below Cedar Creek Reservoir in Segment No. 0804 of the Trinity River Basin.
- Attachment 16, including amended versions of the same, fails to identify private groundwater wells within one mile of the proposed facility and effluent pond as requested by Water Quality Division staff on August 6, 2021, including at least three legally registered domestic water wells owned by Mr. Norwood.
- Star Harbor failed to include all maps, diagrams, basis of design, calculations, and other pertinent data required under Chapter 309 of the Commission's Rules.
- Star Harbor did not include information required for design analysis, hydraulic application rates, and effluent storage calculations; the water balance study is based on incomplete data on crop systems, yearly rainfall, and consumptive use requirements.
- The TLAP Application includes deficient information on nitrogen application rates, soil testing, and irrigation best management practices.
- The proposed pattern and method of disposal will not adequately protect surface water quality and groundwater quality and will result in discharge to surface waters of the state.
- The plant and effluent pond siting in the TLAP Application fails to meet requirements in Chapter 309, Subchapter B, including inaccurate odor buffer zone information, inadequate pond lining requirements, and distance from private water wells.
- Considering the proximity of the proposed facility and effluent storage pond to surface water features owned by Mr. Norwood, the effluent limits in the Draft Permit are inadequate and were improperly calculated under TCEQ's rules.
- The TLAP Application does not include adequate calculations for agronomic uptake of nutrients and other pollutants and, therefore, has not correctly identified suitable crop types for the disposal site.

Mr. Norwood disputes all of the Executive Director's responses in the Response to Comments ("RTC") to Mr. Norwood's comments provided in my November 15, 2021 letter based on the following facts.

- Order No. 5 in TCEQ Docket No. 2019-0575-MWD was a dispositive ruling on multiple issues of fact and law referred by TCEQ in that matter.
- The Executive Director's statement that "the Applicant's TLAP application is not affected by Order No.5 because not only is it a different type of wastewater permit, it is not a discharge application with a discharge route, and is a different and separate application from the 2017 discharge application" is unsupported by applicable law.

Ms. Laurie Gharis
February 22, 2022
Page 3

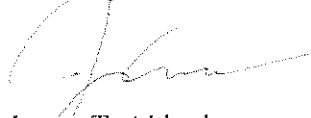
- The Executive Director's reliance on Application Attachment 4 to support the decision that Mr. Norwood is not an adjacent property owner is legally erroneous because the property boundaries illustrated therein are demonstrably inaccurate.
- The Executive Director's apparent determination that a "Memorandum of Understanding" sufficiently conveys property interest for the facility site is unsupported by applicable law.
- Response 3 in the RTC is entirely unresponsive to Mr. Norwood's comment identified as Comment 3.
- The Executive Director's statement that "the Applicant submitted a USGS map properly identifying all groundwater wells within one mile radius of the treatment facility and disposal site" is demonstrably inaccurate—Star Harbor omitted at least three groundwater wells owned by Mr. Norwood that are within one mile of the proposed facility site.
- The RTC responses to Mr. Norwood's comments identified in the RTC as Comments 6 through 11 are general explanations of TCEQ's regulatory authorities and do not specifically address the identified comments.
- RTC Response 12 does not sufficiently cure the notice deficiency created by the related misrepresentation identified in Mr. Norwood's comments.

Mr. Norwood provides the following list of disputed issues of law and policy.

- TCEQ is legally prohibited under the doctrine of collateral estoppel from considering issues raised by the Application that were previously considered in TCEQ Docket No. 2019-0575-MWD—including and especially the Application's proposal to construct waste treatment facilities on the site identified in Attachment 4.
- The Executive Director has violated 30 Tex. Admin. Code § 80.25(b) by refusing to "enter an order" dismissing Star Harbor's previous application for TPDES Permit No. WQ0014268002 with prejudice in TCEQ Docket No. 2019-0575-MWD.
- The Executive Director's refusal to comply with the plain requirement in 30 Tex. Admin. Code § 80.25(b) affects this matter because the required dismissal order would function to legally preclude TCEQ's further consideration of the Application.

Thank you for your consideration of this hearing request.

Sincerely,



James T. Aldredge

copy: Don Norwood

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816 Congress Avenue, Suite 1900
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lglawfirm.com

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jaldredge@lglawfirm.com

February 22, 2022

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Office of the Chief Clerk (MC-105)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

VIA ELECTRONIC FILING AND
FIRST-CLASS MAIL

Re: Application by the City of Star Harbor for TLAP No. WQ0016017001
Hearing Request by Don Norwood

Dear Ms. Gharis:

On behalf of individual landowner Castell Realty LLC ("Castell Realty"), I respectfully file this request for a contested case hearing on the above-referenced application ("Application"). This letter is in furtherance to Castell Realty's public comments submitted in my previous letter dated November 15, 2021 on behalf of both Castell Realty LLC and Don Norwood. By this reference, I hereby incorporate the November 15, 2021 letter and all comments as if set forth expressly in this letter. My fax number is 512-472-0532.

For reasons explained in the November 15, 2021 comment letter, Castell Realty has a personal justiciable interest related to legal property rights that is affected by the Application. Specifically, Castell Realty owns property, including private domestic groundwater wells and surface water features, within one half mile of the proposed permitted facilities, including the wastewater treatment plant and effluent storage lagoon identified in Application Attachment 4. Those legal rights and interests will be affected by the proposed facility and activity in a manner not common to members of the general public because TCEQ's authorization of the same will authorize Star Harbor to conduct regulated activities that could severely impair use and enjoyment property by Castell Realty's owners.

Castell Realty disputes the following relevant and material issues of fact, all of which were raised by Castell Realty in my November 15, 2021 comment letter.

- Public notice of the Application is deficient because the Chief Clerk failed to mail notice to all required persons.
- The Chief Clerk's Notice of Application and Preliminary Decision for Water Quality Land Application Permit for Municipal Wastewater and the Executive Director's Preliminary Decision both incorrectly state that the "wastewater treatment facility and disposal site will be located in the drainage basin of Cedar Creek Reservoir in Segment No. 0818 of the Trinity River Basin." As illustrated in the USGS Topographic Map included as Attachment 15 to the Application, the treatment facility is proposed to be

located in the Cedar Creek watershed below Cedar Creek Reservoir in Segment No. 0804 of the Trinity River Basin.

- Attachment 16, including amended versions of the same, fails to identify private groundwater wells within one mile of the proposed facility and effluent pond as requested by Water Quality Division staff on August 6, 2021, including at least two legally registered domestic water wells owned by Castell Realty.
- Star Harbor failed to include all maps, diagrams, basis of design, calculations, and other pertinent data required under Chapter 309 of the Commission's Rules.
- Star Harbor did not include information required for design analysis, hydraulic application rates, and effluent storage calculations; the water balance study is based on incomplete data on crop systems, yearly rainfall, and consumptive use requirements.
- The TLAP Application includes deficient information on nitrogen application rates, soil testing, and irrigation best management practices.
- The proposed pattern and method of disposal will not adequately protect surface water quality and groundwater quality and will result in discharge to surface waters of the state.
- The plant and effluent pond siting in the TLAP Application fails to meet requirements in Chapter 309, Subchapter B, including inaccurate odor buffer zone information, inadequate pond lining requirements, and distance from private water wells.
- Considering the proximity of the proposed facility and effluent storage pond to surface water features owned and used by Castell Realty, the effluent limits in the Draft Permit are inadequate and were improperly calculated under TCEQ's rules.
- The TLAP Application does not include adequate calculations for agronomic uptake of nutrients and other pollutants and, therefore, has not correctly identified suitable crop types for the disposal site.

Castell Realty disputes all of the Executive Director's responses in the Response to Comments ("RTC") to Castell Realty's comments provided in my November 15, 2021 letter based on the following facts.

- Order No. 5 in TCEQ Docket No. 2019-0575-MWD was a dispositive ruling on multiple issues of fact and law referred by TCEQ in that matter.
- The Executive Director's statement that "the Applicant's TLAP application is not affected by Order No.5 because not only is it a different type of wastewater permit, it is not a discharge application with a discharge route, and is a different and separate application from the 2017 discharge application" is unsupported by applicable law.
- The Executive Director's apparent determination that a "Memorandum of Understanding" sufficiently conveys property interest for the facility site is unsupported by applicable law.
- Response 3 in the RTC is entirely unresponsive to Castell Realty's comment identified as Comment 3.
- The Executive Director's statement that "the Applicant submitted a USGS map properly identifying all groundwater wells within one mile radius of the treatment facility and

Ms. Laurie Gharis
February 22, 2022
Page 3

disposal site” is demonstrably inaccurate—Star Harbor omitted at least two groundwater wells owned by Castell Realty that are within one mile of the proposed facility site.

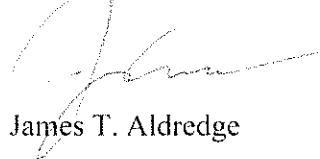
- The RTC responses to Castell Realty’s comments identified in the RTC as Comments 6 through 11 are general explanations of TCEQ’s regulatory authorities and do not specifically address the identified comments.
- RTC Response 12 does not sufficiently cure the notice deficiency created by the related misrepresentation identified in Castell Realty’s comments.

Castell Realty provides the following list of disputed issues of law and policy.

- TCEQ is legally prohibited under the doctrine of collateral estoppel from considering issues raised by the Application that were previously considered in TCEQ Docket No. 2019-0575-MWD—including and especially the Application’s proposal to construct waste treatment facilities on the site identified in Attachment 4.
- The Executive Director has violated 30 Tex. Admin. Code § 80.25(b) by refusing to “enter an order” dismissing Star Harbor’s previous application for TPDES Permit No. WQ0014268002 with prejudice in TCEQ Docket No. 2019-0575-MWD.
- The Executive Director’s refusal to comply with the plain requirement in 30 Tex. Admin. Code § 80.25(b) affects this matter because the required dismissal order would function to legally preclude TCEQ’s further consideration of the Application.

Thank you for your consideration of this hearing request.

Sincerely,



James T. Aldredge

copy: David Berberian, Castell Realty LLC



TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

816 Congress Avenue, Suite 1900
Austin, Texas 78701
512.322.5800 p
512.472.0532 f

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REVIEWED
lglawfirm.com

Mr. Aldredge's Direct Line: (512) 322-5859
jaldredge@lglawfirm.com

CHIEF CLERKS OFFICE

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November 15, 2021

By GCW

Ms. Laurie Gharis, Chief Clerk
Office of the Chief Clerk (MC-105)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

**VIA ELECTRONIC FILING AND
FIRST-CLASS MAIL**

Re: Application by the City of Star Harbor for TLAP No. WQ0016017001
Comments by Castell Realty LLC and Don Norwood

Dear Ms. Gharis:

The Executive Director's preliminary decision that the above-referenced application meets all applicable regulatory requirements violates the agency's rules. In fact, the Texas Commission on Environmental Quality ("TCEQ") lacks jurisdiction to continue its consideration of the application by the City of Star Harbor ("Star Harbor") because the Executive Director, in a prior proceeding, was required under TCEQ's Rules to dismiss with prejudice substantively identical issues as those raised by Star Harbor in this matter. Moreover, Star Harbor's application includes numerous material misrepresentations of relevant facts.

For the foregoing reasons, Castell Realty LLC and Don Norwood (collectively, the "Landowners") respectfully submit the following written comments on the application filed by Star Harbor for Texas Land Application Permit ("TLAP") No. WQ0016017001 (the "TLAP Application") and the Executive Director's preliminary decision on the TLAP Application along with the initial draft TLAP No. WQ0016017001 (the "Draft Permit"). These public comments are submitted in accordance with Chapter 5, Subchapter M and Section 26.028 of the Texas Water Code, and Title 30, Chapter 55 of the Texas Administrative Code. Please add me to your official mailing list for this matter using the following contact information provided in accordance with TCEQ Rule 55.251(c):

James T. Aldredge, on behalf of Castell Realty LLC and Don Norwood
816 Congress Ave., Ste. 1900
Austin, Texas 78701
Telephone: (512) 322-5859
Fax: (512) 472-0532

Background and Fact History

Star Harbor previously filed an application for Texas Pollution Discharge Elimination System ("TPDES") Permit No. WQ0014268002 on October 9, 2017 (the "TPDES Application").

Ms. Laurie Gharis
November 15, 2021
Page 2

The TPDES Application requested authorization to construct a domestic waste treatment facility on property immediately adjacent to land owned by Don Norwood and to discharge treated effluent into Cedar Creek within one mile upstream of Mr. Norwood's property and property owned by Castell Realty LLC.

The Commission granted hearing requests by the Landowners on the TPDES Application and referred the same to the State Office of Administrative Hearings ("SOAH") for a contested case hearing on June 18, 2019. The Landowners filed lengthy scientific testimony and evidence on November 20, 2019 demonstrating numerous deficiencies in the TPDES Application and identified several components of the TPDES Application's proposed plant siting that violate applicable requirements. The Landowners incurred significant expense totaling over \$150,000 to protect their private property rights against Star Harbor's grossly deficient application. Following the Landowners' filing of direct-case evidence, on December 10, 2019, Star Harbor filed a motion to withdraw the TPDES Application in its entirety *with prejudice* pursuant to TCEQ Rule 80.25(b).

Rule 80.25 provides the following: "If the request is to withdraw the application with prejudice, the judge shall remand the application and request to the executive director, who *shall enter an order* dismissing the application with prejudice." 30 Tex. Admin. Code § 80.25(b) (emphasis added). On December 11, 2019, and in accordance with Rule 80.25(b), the presiding Administrative Law Judge ("ALJ") issued an order granting Star Harbor's motion, cancelling the hearing, and dismissing the matter from SOAH's docket. The order also directed TCEQ's Executive Director to enter an order dismissing the TPDES Application with prejudice pursuant to 30 Tex. Admin. Code § 80.25(b). A copy of the ALJ's order is enclosed as Exhibit A.

TCEQ received Star Harbor's TLAP Application on July 14, 2021. The Application proposes to construct a domestic waste treatment facility on the identical site proposed in the TPDES Application. The only changes made in the TLAP Application from the TPDES Application are to (1) change the method of disposal from a point-source discharge to irrigation of an existing golf course, (2) reduce the size and flow of the treatment facility to match the Interim 1 Phase (0.06 million gallons per day) proposed in the TPDES Application, (3) to construct a four-acre effluent storage pond immediately adjacent to the treatment facility site, and (4) relax the proposed effluent limits.

The Executive Director declared the TLAP Application administratively complete on August 16, 2021. Star Harbor published notice of the TLAP Application on August 19, 2021 and October 16, 2021. The Comment period ends on November 15, 2021.

The Landowners learned of Star Harbor's TLAP Application on August 19, 2021 following publication of the initial notice. Importantly, as explained below, the Chief Clerk did not mail notice to either of the Landowners despite the fact that the Commission expressly found that both had personal justiciable interests and were affected by TPDES Application.

The undersigned counsel for the Landowners contacted the Environmental Law Division (“ELD”) on September 2, 2021 to inquire about the status of the final order dismissing the TPDES Application. The undersigned counsel sent a second inquiry on September 21, 2021. An ELD attorney responded on September 22, 2021 indicating that ELD was preparing the order and working to get it approved and signed by the Executive Director. Undersigned counsel sent a follow-up inquiry on the status of the order on October 19, 2021. That day, the ELD attorney responded that the final draft dismissal order had been submitted to the Water Quality Division. Despite these efforts, as of the date of this letter, the Executive Director has yet to enter an order dismissing the TPDES Application with prejudice as required by Rule 80.25(b)—nearly two years after Star Harbor’s request.

Texas Law Precludes Consideration of Issues Raised by the TLAP Application

The words “with prejudice” as used in TCEQ’s rules must be given effect. To understand the intent of that rule, one must look to the context of the rule within Chapter 80, which more generally governs contested case hearing procedure. The rules apply to all contested case hearings held by SOAH. 30 Tex. Admin. Code § 80.1.

Rule 80.25 provides three options for an applicant to withdraw an application after TCEQ refers the application to a contested case hearing but before the ALJ issues a Proposal for Decision (“PFD”) on the application. First, the applicant may unilaterally withdraw the application with prejudice, in which case the judge shall remand the application and request to the Executive Director, who shall enter an order dismissing the application with prejudice. *Id.* § 80.25(b). The second option allows an applicant to withdraw an application without prejudice before parties are named in the hearing or if the parties agree in writing to the withdrawal without prejudice. *Id.* § 80.25(c). In those cases, the Executive Director is required to enter an order dismissing the application without prejudice on the terms agreed to by the parties. *Id.* The third option allows an applicant to request withdrawal without prejudice in lieu of an agreement by the parties if the applicant reimburses the other parties all expenses, not including attorney’s fees, that the other parties have incurred in the permitting process or if the Commission authorizes the dismissal of the application without prejudice. *Id.* § 80.25(d)-(e).

The Commission’s adopted general requirement that parties in a contested case hearing must agree in writing to a withdrawal without prejudice expressly allows the parties to establish the terms on which a withdrawal without prejudice is granted. Alternatively, an applicant may unilaterally elect to withdraw an application without prejudice either before the ALJ names parties or if it reimburses the parties’ expenses. The reimbursement option is important: in that context, the requirement that parties must either agree or be reimbursed before an applicant can obtain dismissal without prejudice protects protesting parties from being forced to incur expenses relitigating issues in a subsequent hearing that were litigated in the hearing on the earlier application.

The principles of TCEQ’s rule track the legal doctrines of *res judicata* and collateral estoppel. Broadly speaking, *res judicata* (known as “claim preclusion”) prohibits a litigant from bringing a suit or claim that has already been finally adjudicated in a previous legal proceeding.

Barr v. Resolution Trust Corp. ex rel. Sunbelt Federal Sav., 837 S.W.2d 627, 628 (Tex. 1992). Collateral estoppel (known as “issue preclusion”) prevents relitigation of particular issues already resolved in a prior suit. *Id.* at 628-29. A dismissal with prejudice is an adjudication on the merits of the claims and issues. *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991).¹

Rule 80.25 precludes Star Harbor from prosecuting and the TCEQ from considering several issues raised in the TLAP Application—most particularly, the suitability of the site on which Star Harbor proposed to construct a domestic waste treatment plant.² Under the well-established doctrine of collateral estoppel, Star Harbor’s motion to withdraw the TPDES Application with prejudice precludes relitigation of all issues that were raised in that contested case hearing. *See Resolution Trust Corp.*, 837 S.W.2d at 628-29.

Refusal to Adhere to the Collateral Estoppel Doctrine Will Create Bad Public Policy

As noted, the Landowners have spent in excess of \$150,000 fighting Star Harbor’s deeply flawed efforts to obtain waste treatment and discharge authorizations. Unlike Star Harbor, the Landowners are private individuals who cannot levy taxes or issue bonds to finance litigation that they have been dragged into. If the Commission refuses to give meaning to its own rules on application withdrawal and dismissal with prejudice, then the resulting policy of the State of Texas will effectively be that an environmental permitting applicant can file and refile any slightly modified application over and over until the protesting parties simply run out of money. That cannot and should not be the policy of this State.

Star Harbor’s request for authorization to construct a domestic waste treatment facility on land adjacent to Mr. Norwood’s property has been adjudicated by the TCEQ in a prior proceeding. As explained, Texas law precludes the Commission from adjudicating any issue that was raised in the previous hearing—including Star Harbor’s legal interest in the property proposed for the facility, need for the proposed permit, regionalization, and plant-siting issues relating to odors and buffer zones.³ Star Harbor’s request to withdraw the TPDES Application with prejudice constitutes a final adjudication on those issues. *See Mossler*, 818 S.W.2d at 754.

¹ Conversely, a partial summary judgment only results in dismissal with prejudice as to the issues decided in the partial summary judgment. *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 854 (Tex. 1995). As explained, Star Harbor withdrew the TPDES Application with prejudice in its entirety prior to any ruling by the ALJ. As a result, all issues that were litigated or could have been litigated in the TPDES Application hearing—including the Commissioners’ referred issues related to plant siting—are precluded from consideration in this or any other subsequent legal proceeding.

² The doctrine of *res judicata* does not preclude Star Harbor’s filing of a TLAP Application generally. The pattern and place of disposal proposed in the TLAP Application is substantially different from that requested in the TPDES Application. Those components of the TLAP Application were not and could not have been litigated or adjudicated in the TPDES Application hearing. But the issue of constructing a waste treatment facility on the proposed site was adjudicated. *See Mossler*, 818 S.W.2d at 754. Consequently, collateral estoppel precludes the plant-siting elements of the TLAP Application insofar as they are the same requests made in the TPDES Application. Essentially, if Star Harbor wants a TLAP, it needs to move the proposed plant site.

³ A copy of TCEQ’s Interim Order on the TPDES Application is enclosed as Exhibit B.

Ms. Laurie Gharis
November 15, 2021
Page 5

Therefore, the Commission should immediately return the TLAP Application to avoid further injustice to the Landowners.

Material Misrepresentations Result in Public Notice Failures

Perhaps the most critical deficiency of the TLAP Application is its falsification of property boundaries depicted on the Landowner Map, which Star Harbor included in Attachment 4 to the Application. A copy of the Landowner Map for the proposed facility and effluent pond site Star Harbor included in Attachment 4 is enclosed as Exhibit C to this comment letter.

The Application and Landowner Map include significant and material misrepresentations related to identifying potentially affected landowners. The Application and Landowner Map falsely assert that Star Harbor owns the land on which it proposes to construct the proposed facility and effluent holding pond. The Landowner Map depicts the immediate area around the facility and pond as constituting the "Applicant Property Boundary" when, in fact, the land is currently owned by the Tarrant Regional Water District ("TRWD"). As demonstrated by Attachment 2 to the Application, which falsely characterizes its contents as constituting a "Lease Agreement," Star Harbor and TRWD have agreed to a Memorandum of Understanding in which TRWD stated its intend to conditionally approve a draft easement for Star Harbor's use of the land. Attached to the MOU is an unexecuted draft easement. Attachment 2 affirmatively demonstrates that Star Harbor does not possess any property interest in the land it represents in Attachment 4 as being bound by the "Applicant Property Boundary." There has been no legal subdivision that would create the "Applicant Property Boundary" illustrated on the Landowner Map. Consequently, Attachment 4 incorrectly represents that the only landowner adjacent to the proposed facility and effluent pond site is TRWD.

The actual property boundary for the proposed facility and pond site is illustrated in the enclosed Exhibit D, which the Landowners obtained from the Henderson Central Appraisal District's official records. The boundary line of the TRWD property on which Star Harbor proposes to site the treatment facility and storage pond is illustrated as being adjacent to property owned by Don Norwood substantially north of the line drawn by Star Harbor in its Landowner Map. It is effectively the same line as the southern portion of Star Harbor's claimed "Property Boundary." Star Harbor has effectively declared that TRWD owns land that encroaches significantly onto Mr. Norwood's property, including over an unpaved access road used by Mr. Norwood to access a domestic groundwater wellhead.

Through this misrepresentation, Star Harbor created a fictitious strip of land that buffers its proposed facility site from Mr. Norwood's property. This is a particularly egregious abuse of TCEQ's process considering the fact that Star Harbor previously identified the Norwood family as having owned the same property on the Landowner Map attached to the TPDES Application.⁴ The TPDES Application, which again proposed to construct a treatment facility on the same site

⁴ At the time of the TPDES Application, the subject property was owned by Mr. Norwood's father. Ownership of the property was legally deeded to Don Norwood on May 8, 2020.

currently proposed by the TLAP Application, affirmatively represented that the Norwoods were affected persons.⁵ The TPDES Application Landowner Map is enclosed as Exhibit E.

As a result of Star Harbor's misrepresentation, Don Norwood was not included on the Landowner List in TLAP Application Attachment 4. Consequently, the Chief Clerk did not include Mr. Norwood on its mailed notice list. This alone constitutes a critical failure of public notice under Water Code Chapter 5, Subchapter M that can only be cured through an amendment correcting the Landowner Map.

Additional TLAP Application Deficiencies

The Landowners raise the following additional issues related to the TLAP Application:

- Based on misrepresentations, the Chief Clerk's Notice of Application and Preliminary Decision for Water Quality Land Application Permit for Municipal Wastewater and the Executive Director's Preliminary Decision both incorrectly state that the "wastewater treatment facility and disposal site will be located in the drainage basin of Cedar Creek Reservoir in Segment No. 0818 of the Trinity River Basin. As illustrated in the USGS Topographic Map included as Attachment 15 to the TLAP Application, the treatment facility is proposed to be located in the Cedar Creek watershed below Cedar Creek Reservoir in Segment No. 0804 of the Trinity River Basin.
- Attachment 16, including amended versions of the same, fails to identify private groundwater wells within one mile of the proposed facility and effluent pond as requested by Water Quality Division staff on August 6, 2021, including at least five legally registered domestic water wells owned by the Landowners.
- Star Harbor failed to include all maps, diagrams, basis of design, calculations, and other pertinent data required under Chapter 309 of the Commission's Rules.
- Star Harbor did not include information required for design analysis, hydraulic application rates, and effluent storage calculations; the water balance study is based on incomplete data on crop systems, yearly rainfall, and consumptive use requirements.
- The TLAP Application includes deficient information on nitrogen application rates, soil testing, and irrigation best management practices.
- The proposed pattern and method of disposal will not adequately protect surface water quality and groundwater quality and will result in discharge to surface waters of the state.
- The plant and effluent pond siting in the TLAP Application fails to meet requirements in Chapter 309, Subchapter B, including inaccurate odor buffer zone information, inadequate pond lining requirements, and distance from private water wells.
- Considering the proximity of the proposed facility and effluent storage pond to surface water features owned by the Landowners, the effluent limits in the Draft Permit are inadequate and were improperly calculated under TCEQ's rules.

⁵ The TPDES Application Landowner Map actually omits the property immediately adjacent to the proposed plant. The Landowners reiterate, as they stated in 2019, that the Water Quality Division should not have declared the TPDES Application administratively complete without Star Harbor's correction of material deficiencies.

Ms. Laurie Gharis
November 15, 2021
Page 7

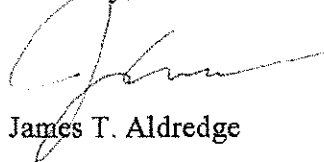
- The TLAP Application does not include adequate calculations for agronomic uptake of nutrients and other pollutants and, therefore, has not correctly identified suitable crop types for the disposal site.

Conclusion

Finally, the Landowners note that they have directly engaged with public officials and engineers representing Star Harbor in a continuing attempt to negotiate a resolution of this dispute. The Landowners' direct testimony in the TPDES Application asserted that the Landowners wish to be good neighbors and will proactively work with Star Harbor to find a mutually agreeable solution for Star Harbor's waste disposal needs. Notwithstanding the fact that Star Harbor, without consulting the landowners, refiled the same request to site a waste treatment plant as close to the Landowners' properties as possible, the Landowners are making good on their promise and hope that this matter can be resolved amicably. Star Harbor cannot, however, legally construct a waste treatment plant on the site they are currently proposing, and the Landowners will continue to assert all of their legal rights and claims until a competent adjudicative body enforces the law. The Landowners earnest hope is that, in lieu of settlement, the TCEQ will be that adjudicator.

The Landowners will provide any other information or insight that might be helpful to either TCEQ staff or Star Harbor's representatives upon request. Thank you for your consideration of these comments.

Sincerely,



James T. Aldredge

copy: Warren Claxton, Mayor, City of Star Harbor
Christina O'Jibway, Office of Senator Robert Nichols
Rick Carroll, Tarrant Regional Water District
Robert Sadlier, Director, Water Quality Division
Firoj Vahora, Municipal Permit Team Lead, Water Quality Division
Guy Henry, Acting Director, ELD
Todd Galiga, Senior Attorney, ELD
Michael Parr, Attorney, ELD
Vic McWherter, OPIC
David Berberian, Castell Realty LLC
Don Norwood

enclosures

Exhibit A

SOAH Order No. 5 Granting Motion to Withdraw and Remand Application

SOAH DOCKET NO. 582-19-6260
TCEQ DOCKET NO. 2019-0575-MWD

APPLICATION BY CITY OF STAR
HARBOR FOR TPDES PERMIT NO.
WQ0015666001 IN HENDERSON
COUNTY, TEXAS

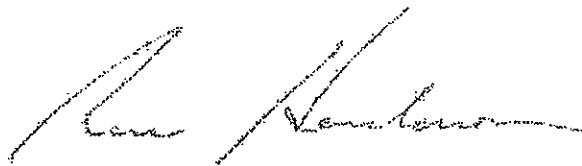
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BEFORE THE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

ORDER NO. 5
GRANTING MOTION TO WITHDRAW AND REMAND APPLICATION

On December 10, 2019, City of Star Harbor filed a motion to withdraw and remand its application with prejudice. It is therefore **ORDERED** that the Motion to Dismiss and Remand is **GRANTED**, that the hearing set for **January 21-23, 2020**, is **CANCELLED**, and that this matter is **DISMISSED** from the docket of the State Office of Administrative Hearings and **REMANDED** to the Executive Director of the Texas Commission on Environmental Quality who shall enter an order dismissing the application with prejudice pursuant to 30 Texas Administrative Code § 80.25(b).

SIGNED December 11, 2019.



ROSS HENDERSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE

300 West 15th Street Suite 504

Austin, Texas 78701

Phone: (512) 475-4993

Fax: (512) 322-2061

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)

STYLE/CASE: CITY OF STAR HARBOR

SOAH DOCKET NUMBER: 582-19-6260

REFERRING AGENCY CASE: 2019-0575-MWD

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ ROSS HENDERSON**

REPRESENTATIVE / ADDRESS

PARTIES

ELI MARTINEZ
OFFICE OF PUBLIC INTEREST COUNSEL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-103 P.O. BOX 13087
AUSTIN, TX 78711
(512) 239-3974 (PH)
(512) 239-6377 (FAX)
eli.martinez@tceq.texas.gov

OFFICE OF PUBLIC INTEREST COUNSEL

MICHAEL T. PARR, II
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
ENVIRONMENTAL LAW DIVISION
MC 173 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-0611 (PH)
(512) 239-0626 (FAX)
michael.parr@tceq.texas.gov

TCEQ

JAMES ALDREDGE
LLOYD GOSSELINK ROCHELL & TOWNSEND, P.C.
816 CONGRESS AVE., SUITE 1900
AUSTIN, TX 78701-2478
(512) 322-5859 (PH)
(512) 472-0532 (FAX)
jaldredge@lglawfirm.com

DON NORWOOD

CEDAR CREEK RANCH, LTD.

CASTELL REALTY, LLC

GEOFFREY P. KIRSHBAUM
TERRILL, & WALDRUP
810 W. 10TH ST
AUSTIN, TX 78701
(512) 474-9100 (PH)
(512) 474-9888 (FAX)
gkirshbaum@terillwaldrup.com

CITY OF STAR HARBOR, TEXAS

Exhibit B

Interim Order on TPDES Application

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN INTERIM ORDER concerning the application by the City of Star Harbor for TPDES Permit No. WQ0014268002; TCEQ Docket No. 2019-0575-MWD.

On June 12, 2019, the Texas Commission on Environmental Quality (Commission) considered during its open meeting requests for hearing and reconsideration filed by Castell Realty, LLC; Cedar Creek Ranch, Ltd.; Don Norwood; and the City of Malakoff (collectively, Requestors) concerning the application by the City of Star Harbor for new TPDES Permit No. WQ0014268002 at a facility proposed to be located approximately 3,050 feet west of the intersection of Briarwood and FM 3062, and 3,500 feet south of the intersection of FM 3062 and Jupiter Road, Henderson County, Texas. The requests for hearing and reconsideration were evaluated under the requirements in the applicable statutes and Commission rules, including 30 Texas Administrative Code Chapter 55. The Commission also considered the responses to the requests for hearing and reconsideration filed by the Executive Director and Office of Public Interest Counsel; the Requestors' replies; all timely public comment; and the Executive Director's Response to Comment.

After evaluation of all relevant filings, the Commission determined that Castell Realty, LLC; Cedar Creek Ranch, Ltd.; Don Norwood; and the City of Malakoff are affected persons and granted their requests for hearing. The Commission determined to deny the Requestors' requests

for reconsideration. The Commission next determined whether the requests for hearing raised disputed issues of fact or mixed questions of fact and law that were raised by affected persons during the comment period, and which are relevant and material to the decision on the application. The Commission determined that the following issues met those requirements and directed that they be referred to the State Office of Administrative Hearings (SOAH) for contested case hearing:

- A) Whether the Applicant has a sufficient legal interest in the property proposed for the facility to submit an application for a permit under 30 TAC § 305.43(a);
- B) Whether the Applicant has adequately demonstrated a need for each phase of the draft permit;
- C) Whether issuance of the draft permit is contrary to the state's regionalization policy or Texas Water Code § 26.0282;
- D) Whether the proposed facility will cause nuisance odors, including compliance with any applicable buffer zone requirements;
- E) Whether the water quality uses of the receiving waters were correctly determined;
- F) Whether the proposed discharge will violate TCEQ antidegradation policy and procedures or negatively impact aquatic or terrestrial wildlife species; and
- G) Whether the proposed discharge will be protective of water quality under the applicable surface water quality standards in 30 Texas Administrative Code Chapter 307.

The Commission also determined to initially refer the matter to the TCEQ's Alternative Dispute Resolution (ADR) Program, concurrent with the SOAH preliminary hearing scheduling process. Finally, the Commission specified that the maximum duration of the contested case hearing shall be 180 days from the date of the preliminary hearing until the proposal for decision is issued by SOAH.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

- 1) The hearing requests of Castell Realty, LLC; Cedar Creek Ranch, Ltd.; Don Norwood; and the City of Malakoff are hereby GRANTED;
- 2) All requests for reconsideration are hereby DENIED;
- 3) The matter is hereby REFERRED to the TCEQ's ADR Program concurrent with the SOAH preliminary hearing scheduling process;
- 4) The following issues are referred to SOAH for a contested case hearing on the application:
 - A) Whether the Applicant has a sufficient legal interest in the property proposed for the facility to submit an application for a permit under 30 TAC § 305.43(a);
 - B) Whether the Applicant has adequately demonstrated a need for each phase of the draft permit;
 - C) Whether issuance of the draft permit is contrary to the state's regionalization policy or Texas Water Code § 26.0282;
 - D) Whether the proposed facility will cause nuisance odors, including compliance with any applicable buffer zone requirements;
 - E) Whether the water quality uses of the receiving waters were correctly determined;
 - F) Whether the proposed discharge will violate TCEQ antidegradation policy and procedures or negatively impact aquatic or terrestrial wildlife species; and
 - G) Whether the proposed discharge will be protective of water quality under the applicable surface water quality standards in 30 Texas Administrative Code Chapter 307.
- 5) All issues not identified as being referred to SOAH in Ordering Provision No. 4 are hereby DENIED;
- 6) The maximum duration of the hearing is set at 180 days from the date of the preliminary hearing until the date the proposal for decision is issued by SOAH; and

- 7) If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

**TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**



Jon Niermann, Chairman

6/18/19

Date Signed

Exhibit C

TLAP Application Landowner Map



WASTELINE
ENGINEERING, INC.

Attachment 4 – Affected Landowner Map

RECEIVED
JUL 14 2021
Water Quality Applications Team

Date: June 2021
Drawn by: J.A.F.
Designed by: G.B.
Project Job#: 221XX

WASTELINE
ENGINEERING, INC.
Texas Registered Engineering Firm #1669

NEW WWTP PERMIT
FOR
CITY OF STAR HARBOR
LANDOWNER INFORMATION

ATTACHMENT
A4.1



0 200 400
GRAPHIC SCALE IN FEET

1: TARRANT REGIONAL WATER DISTRICT
800 E. NORTHSIDE DRIVE
FORT WORTH, TX 76102

150' BUFFER ZONE

APPLICANT PROPERTY BOUNDARY

PROPOSED FACILITY BOUNDARY

EFFLUENT HOLDING POND

COUNTY ROAD 3062

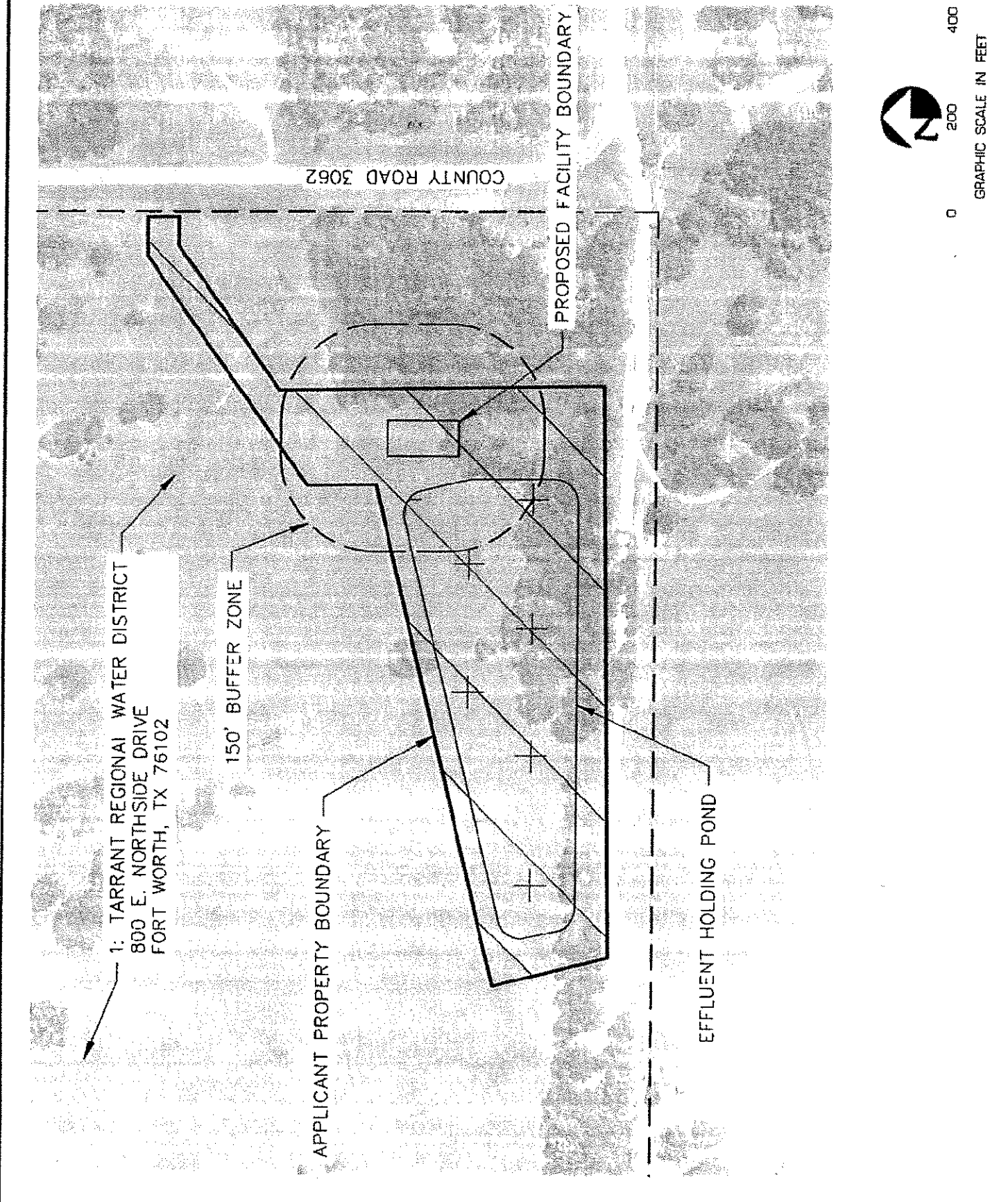


Exhibit D

Henderson Central Appraisal District Property Boundary Map

Parcel Owner: NORWOOD DON C & LORI

[View More Property Information](#)

[Click Here for GIS Shapefile Data](#)

Property Information

Property ID: R19505
Legal Acreage: 135.00
GEO ID: 0755.0010.0400.00
Legal Description: AB 755 F TUMLINSON
SUR TR 1A
Tract or Lot: TR 1A
Abstract Subdivision Code:
Block:
Neighborhood Code:
School District: ML
City Limits:

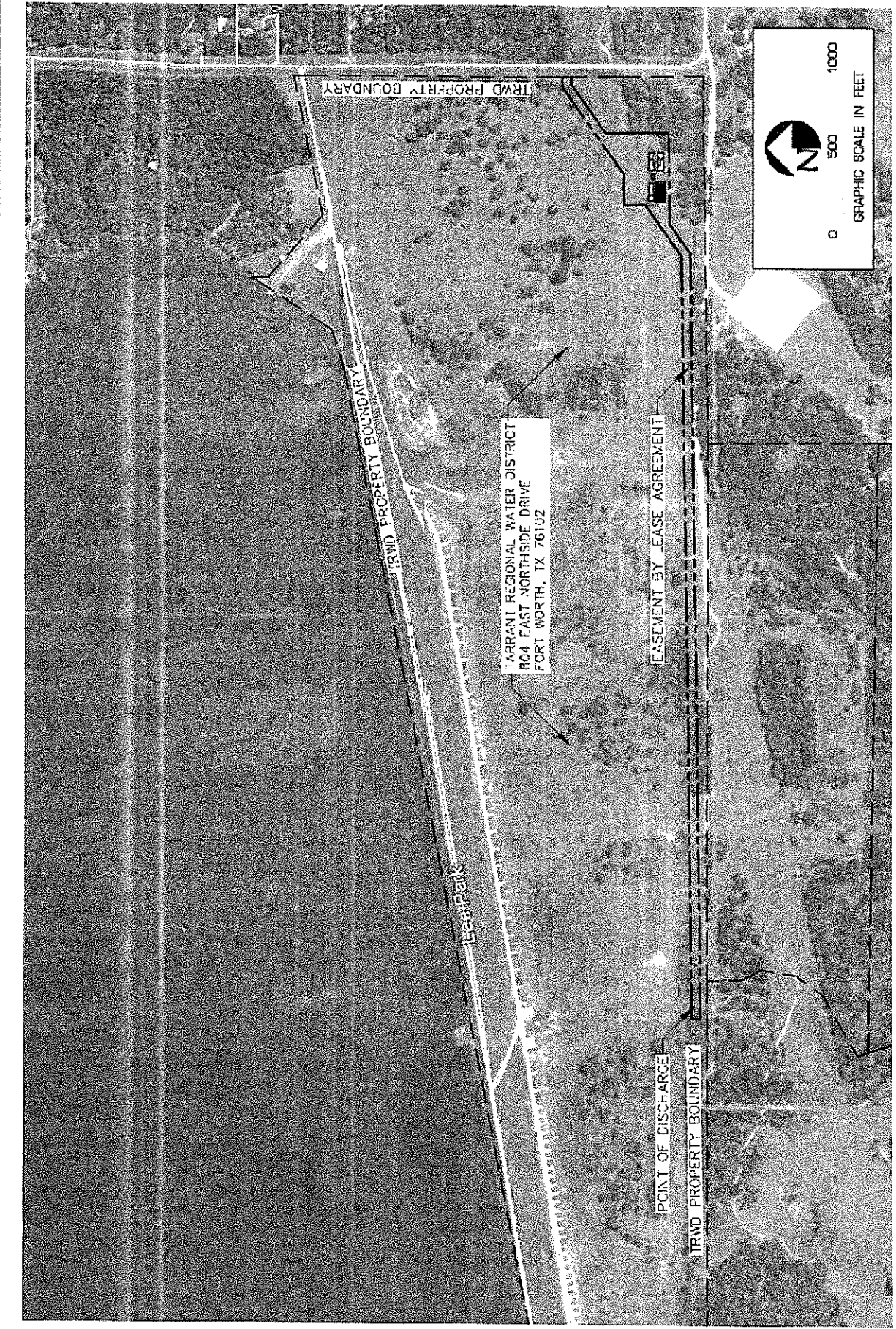
2008-12-20

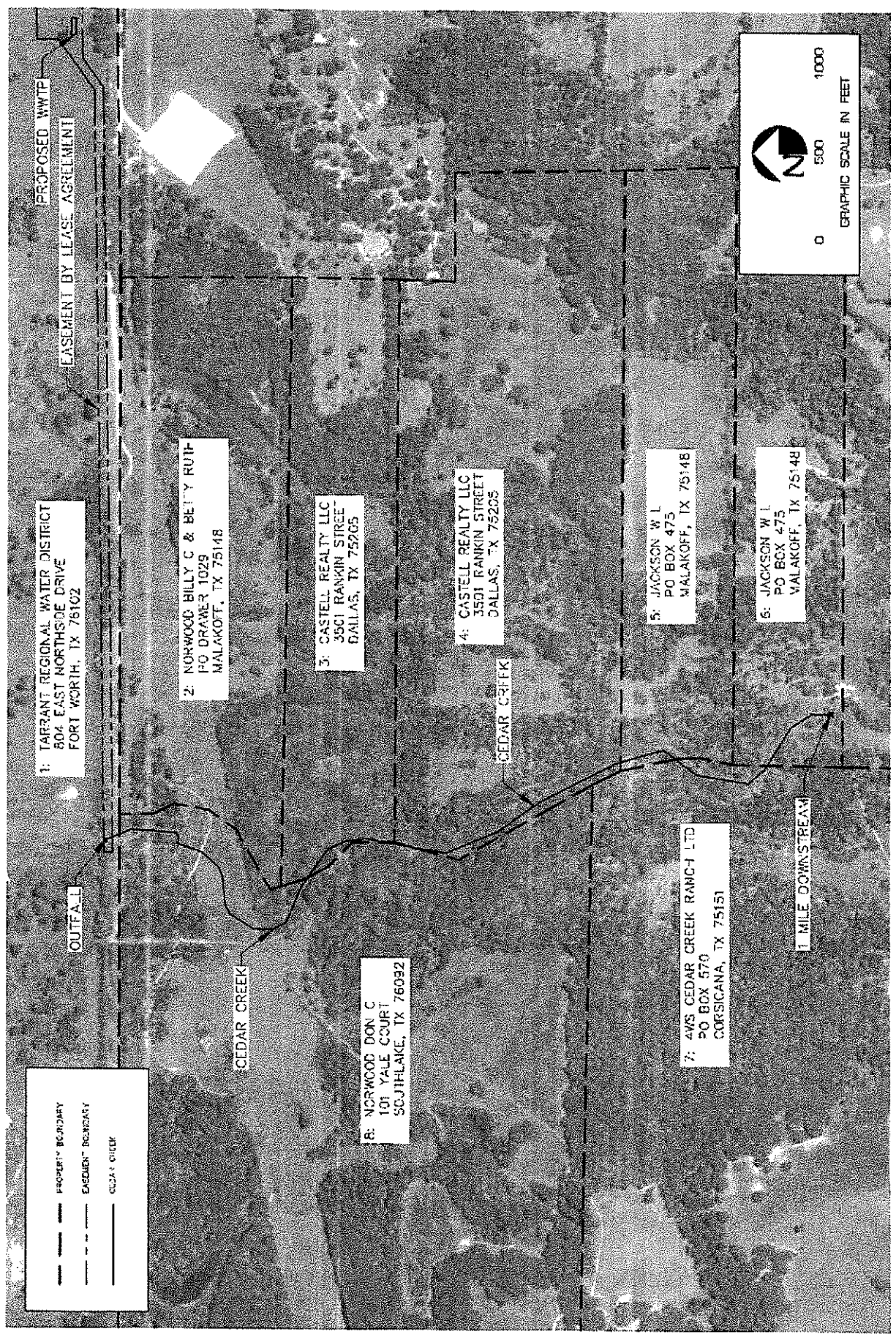
Exhibit E

TPDES Application Landowner Map and List

WASTE LINE ENGINEERING, INC.
 Texas Registered Engineer
 203 S Fourn Street
 Aledo, Texas 75028
 (817) 441-1033 fax
 (817) 441-1033 fax

Date: September 2017
 Drawn by: J.A.F.
 Designed by: G.B.
 G.B.
 Project Job#: 21704





Landowner List

#	Name	Address	City, State, Zip
1	Tarrant Regional Water District	804 East Northside Drive	Fort Worth, Texas 76102
2	Norwood Billy C & Betty Ruth	PO Drawer 1029	Malakoff, Texas 75148
3	Castell Realty LLC	3501 Rankin Street	Dallas, Texas 75205
4	Castell Realty LLC	3501 Rankin Street	Dallas, Texas 75205
5	Jackson W L	PO Box 475	Malakoff, Texas 75148
6	Jackson W L	PO Box 475	Malakoff, Texas 75148
7	AWYS Cedar Creek Ranch LTD	PO Box 570	Corstiana, Texas 75151
8	Norwood Don C	101 Yale Court	Southlake, Texas 76092

NEOPOST FIRST-CLASS MAIL
11/15/2021
\$008.769
ZIP 78701
0510011260318

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
NOV 17 AM 9:38
JURY CLERKS OFFICE

First Class Mail

3458-1

DXG

Lloyd Gosselink
ATTORNEYS AT LAW

Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue Suite 1900 Austin, Texas 78701

To:

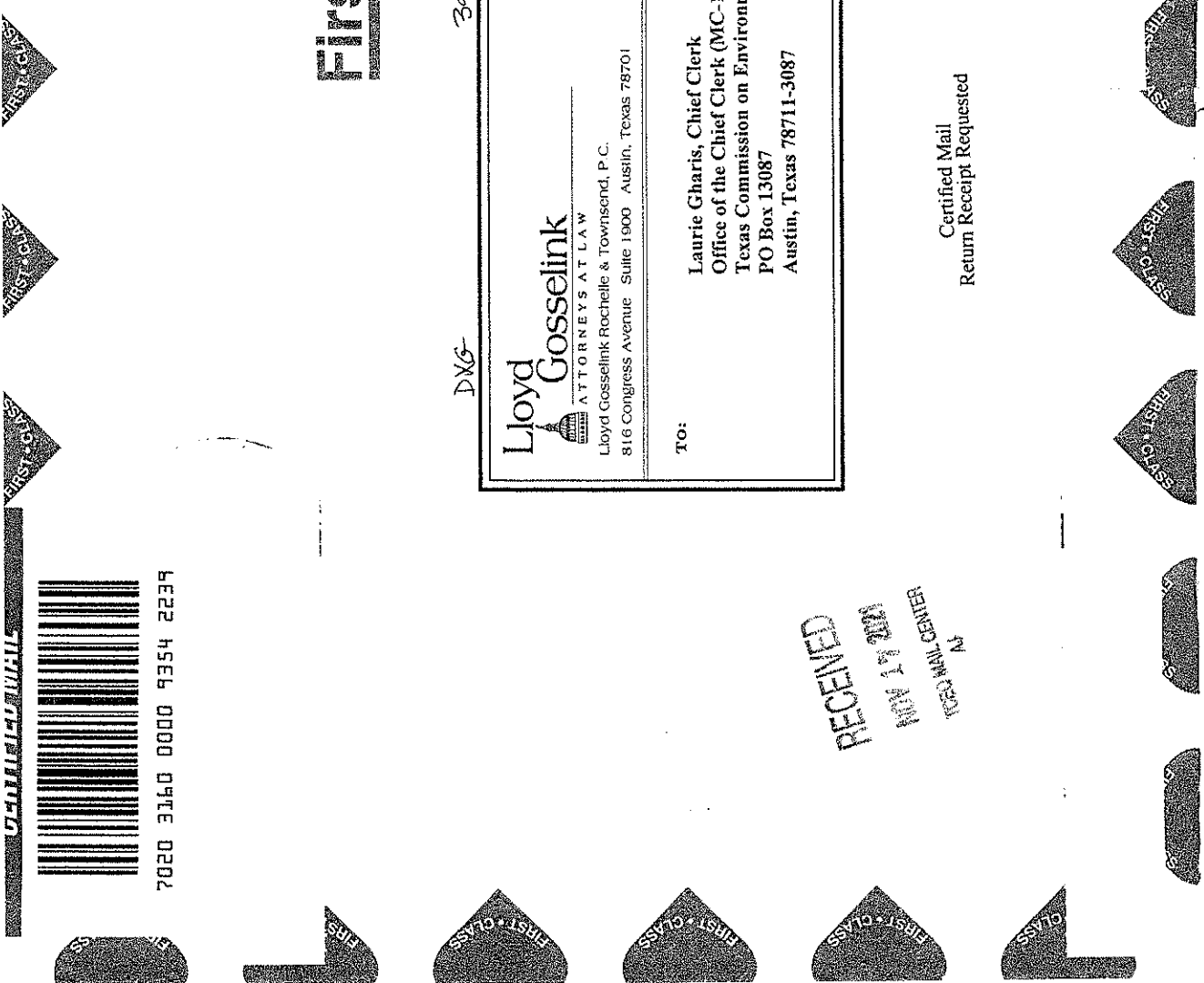
Laurie Gharis, Chief Clerk
Office of the Chief Clerk (MC-105)
Texas Commission on Environmental Quality
PO Box 13087
Austin, Texas 78711-3087

Certified Mail
Return Receipt Requested

RECEIVED
NOV 17 2021
RECORDS CENTER



7020 3160 0000 9354 2234



Lori Rowe

From: PUBCOMMENT-OCC
Sent: Tuesday, November 16, 2021 8:59 AM
To: PUBCOMMENT-OCC2; PUBCOMMENT-OPIC; PUBCOMMENT-ELD; PUBCOMMENT-WQ
Subject: FW: Public comment on Permit Number WQ0016017001
Attachments: Landowner Comments.pdf

MWD
124823

From: jaldredge@lglawfirm.com <jaldredge@lglawfirm.com>
Sent: Monday, November 15, 2021 3:54 PM
To: PUBCOMMENT-OCC <PUBCOMMENT-OCC@tceq.texas.gov>
Subject: Public comment on Permit Number WQ0016017001

REGULATED ENTY NAME STAR HARBOR WWTP

RN NUMBER: RN111296158

PERMIT NUMBER: WQ0016017001

DOCKET NUMBER:

COUNTY: HENDERSON

PRINCIPAL NAME: CITY OF STAR HARBOR

CN NUMBER: CN600631246

FROM

NAME: James Aldredge

E-MAIL: jaldredge@lglawfirm.com

COMPANY: Lloyd Gosselink Rochelle & Townsend, P.C.

ADDRESS: 816 CONGRESS AVE Suite 1900
AUSTIN TX 78701-2442

PHONE: 5123225859

FAX:

COMMENTS: Landowner Comment Letter Attached



816 Congress Avenue, Suite 1900
Austin, Texas 78701
512.322.5800 p
512.472.0532 f
lglawfirm.com

Mr. Aldredge's Direct Line: (512) 322-5859
jaldredge@lglawfirm.com

November 15, 2021

Ms. Laurie Gharis, Chief Clerk
Office of the Chief Clerk (MC-105)
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

VIA ELECTRONIC FILING AND
FIRST-CLASS MAIL

Re: Application by the City of Star Harbor for TLAP No. WQ0016017001
Comments by Castell Realty LLC and Don Norwood

Dear Ms. Gharis:

The Executive Director's preliminary decision that the above-referenced application meets all applicable regulatory requirements violates the agency's rules. In fact, the Texas Commission on Environmental Quality ("TCEQ") lacks jurisdiction to continue its consideration of the application by the City of Star Harbor ("Star Harbor") because the Executive Director, in a prior proceeding, was required under TCEQ's Rules to dismiss with prejudice substantively identical issues as those raised by Star Harbor in this matter. Moreover, Star Harbor's application includes numerous material misrepresentations of relevant facts.

For the foregoing reasons, Castell Realty LLC and Don Norwood (collectively, the "Landowners") respectfully submit the following written comments on the application filed by Star Harbor for Texas Land Application Permit ("TLAP") No. WQ0016017001 (the "TLAP Application") and the Executive Director's preliminary decision on the TLAP Application along with the initial draft TLAP No. WQ0016017001 (the "Draft Permit"). These public comments are submitted in accordance with Chapter 5, Subchapter M and Section 26.028 of the Texas Water Code, and Title 30, Chapter 55 of the Texas Administrative Code. Please add me to your official mailing list for this matter using the following contact information provided in accordance with TCEQ Rule 55.251(c):

James T. Aldredge, on behalf of Castell Realty LLC and Don Norwood
816 Congress Ave., Ste. 1900
Austin, Texas 78701
Telephone: (512) 322-5859
Fax: (512) 472-0532

Background and Fact History

Star Harbor previously filed an application for Texas Pollution Discharge Elimination System ("TPDES") Permit No. WQ0014268002 on October 9, 2017 (the "TPDES Application").

Ms. Laurie Gharis
November 15, 2021
Page 2

The TPDES Application requested authorization to construct a domestic waste treatment facility on property immediately adjacent to land owned by Don Norwood and to discharge treated effluent into Cedar Creek within one mile upstream of Mr. Norwood's property and property owned by Castell Realty LLC.

The Commission granted hearing requests by the Landowners on the TPDES Application and referred the same to the State Office of Administrative Hearings ("SOAH") for a contested case hearing on June 18, 2019. The Landowners filed lengthy scientific testimony and evidence on November 20, 2019 demonstrating numerous deficiencies in the TPDES Application and identified several components of the TPDES Application's proposed plant siting that violate applicable requirements. The Landowners incurred significant expense totaling over \$150,000 to protect their private property rights against Star Harbor's grossly deficient application. Following the Landowners' filing of direct-case evidence, on December 10, 2019, Star Harbor filed a motion to withdraw the TPDES Application in its entirety *with prejudice* pursuant to TCEQ Rule 80.25(b).

Rule 80.25 provides the following: "If the request is to withdraw the application with prejudice, the judge shall remand the application and request to the executive director, who *shall enter an order* dismissing the application with prejudice." 30 Tex. Admin. Code § 80.25(b) (emphasis added). On December 11, 2019, and in accordance with Rule 80.25(b), the presiding Administrative Law Judge ("ALJ") issued an order granting Star Harbor's motion, cancelling the hearing, and dismissing the matter from SOAH's docket. The order also directed TCEQ's Executive Director to enter an order dismissing the TPDES Application with prejudice pursuant to 30 Tex. Admin. Code § 80.25(b). A copy of the ALJ's order is enclosed as Exhibit A.

TCEQ received Star Harbor's TLAP Application on July 14, 2021. The Application proposes to construct a domestic waste treatment facility on the identical site proposed in the TPDES Application. The only changes made in the TLAP Application from the TPDES Application are to (1) change the method of disposal from a point-source discharge to irrigation of an existing golf course, (2) reduce the size and flow of the treatment facility to match the Interim 1 Phase (0.06 million gallons per day) proposed in the TPDES Application, (3) to construct a four-acre effluent storage pond immediately adjacent to the treatment facility site, and (4) relax the proposed effluent limits.

The Executive Director declared the TLAP Application administratively complete on August 16, 2021. Star Harbor published notice of the TLAP Application on August 19, 2021 and October 16, 2021. The Comment period ends on November 15, 2021.

The Landowners learned of Star Harbor's TLAP Application on August 19, 2021 following publication of the initial notice. Importantly, as explained below, the Chief Clerk did not mail notice to either of the Landowners despite the fact that the Commission expressly found that both had personal justiciable interests and were affected by TPDES Application.

The undersigned counsel for the Landowners contacted the Environmental Law Division (“ELD”) on September 2, 2021 to inquire about the status of the final order dismissing the TPDES Application. The undersigned counsel sent a second inquiry on September 21, 2021. An ELD attorney responded on September 22, 2021 indicating that ELD was preparing the order and working to get it approved and signed by the Executive Director. Undersigned counsel sent a follow-up inquiry on the status of the order on October 19, 2021. That day, the ELD attorney responded that the final draft dismissal order had been submitted to the Water Quality Division. Despite these efforts, as of the date of this letter, the Executive Director has yet to enter an order dismissing the TPDES Application with prejudice as required by Rule 80.25(b)—nearly two years after Star Harbor’s request.

Texas Law Precludes Consideration of Issues Raised by the TLAP Application

The words “with prejudice” as used in TCEQ’s rules must be given effect. To understand the intent of that rule, one must look to the context of the rule within Chapter 80, which more generally governs contested case hearing procedure. The rules apply to all contested case hearings held by SOAH. 30 Tex. Admin. Code § 80.1.

Rule 80.25 provides three options for an applicant to withdraw an application after TCEQ refers the application to a contested case hearing but before the ALJ issues a Proposal for Decision (“PFD”) on the application. First, the applicant may unilaterally withdraw the application with prejudice, in which case the judge shall remand the application and request to the Executive Director, who shall enter an order dismissing the application with prejudice. *Id.* § 80.25(b). The second option allows an applicant to withdraw an application without prejudice before parties are named in the hearing or if the parties agree in writing to the withdrawal without prejudice. *Id.* § 80.25(c). In those cases, the Executive Director is required to enter an order dismissing the application without prejudice on the terms agreed to by the parties. *Id.* The third option allows an applicant to request withdrawal without prejudice in lieu of an agreement by the parties if the applicant reimburses the other parties all expenses, not including attorney’s fees, that the other parties have incurred in the permitting process or if the Commission authorizes the dismissal of the application without prejudice. *Id.* § 80.25(d)-(e).

The Commission’s adopted general requirement that parties in a contested case hearing must agree in writing to a withdrawal without prejudice expressly allows the parties to establish the terms on which a withdrawal without prejudice is granted. Alternatively, an applicant may unilaterally elect to withdraw an application without prejudice either before the ALJ names parties or if it reimburses the parties’ expenses. The reimbursement option is important: in that context, the requirement that parties must either agree or be reimbursed before an applicant can obtain dismissal without prejudice protects protesting parties from being forced to incur expenses relitigating issues in a subsequent hearing that were litigated in the hearing on the earlier application.

The principles of TCEQ’s rule track the legal doctrines of *res judicata* and collateral estoppel. Broadly speaking, *res judicata* (known as “claim preclusion”) prohibits a litigant from

bringing a suit or claim that has already been finally adjudicated in a previous legal proceeding. *Barr v. Resolution Trust Corp. ex rel. Sunbelt Federal Sav.*, 837 S.W.2d 627, 628 (Tex. 1992). Collateral estoppel (known as “issue preclusion”) prevents relitigation of particular issues already resolved in a prior suit. *Id.* at 628-29. A dismissal with prejudice is an adjudication on the merits of the claims and issues. *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex. 1991).¹

Rule 80.25 precludes Star Harbor from prosecuting and the TCEQ from considering several issues raised in the TLAP Application—most particularly, the suitability of the site on which Star Harbor proposed to construct a domestic waste treatment plant.² Under the well-established doctrine of collateral estoppel, Star Harbor’s motion to withdraw the TPDES Application with prejudice precludes relitigation of all issues that were raised in that contested case hearing. *See Resolution Trust Corp.*, 837 S.W.2d at 628-29.

Refusal to Adhere to the Collateral Estoppel Doctrine Will Create Bad Public Policy

As noted, the Landowners have spent in excess of \$150,000 fighting Star Harbor’s deeply flawed efforts to obtain waste treatment and discharge authorizations. Unlike Star Harbor, the Landowners are private individuals who cannot levy taxes or issue bonds to finance litigation that they have been dragged into. If the Commission refuses to give meaning to its own rules on application withdrawal and dismissal with prejudice, then the resulting policy of the State of Texas will effectively be that an environmental permitting applicant can file and refile any slightly modified application over and over until the protesting parties simply run out of money. That cannot and should not be the policy of this State.

Star Harbor’s request for authorization to construct a domestic waste treatment facility on land adjacent to Mr. Norwood’s property has been adjudicated by the TCEQ in a prior proceeding. As explained, Texas law precludes the Commission from adjudicating any issue that was raised in the previous hearing—including Star Harbor’s legal interest in the property proposed for the facility, need for the proposed permit, regionalization, and plant-siting issues relating to odors and buffer zones.³ Star Harbor’s request to withdraw the TPDES Application with prejudice constitutes a final adjudication on those issues. *See Mossler*, 818 S.W.2d at 754.

¹ Conversely, a partial summary judgment only results in dismissal with prejudice as to the issues decided in the partial summary judgment. *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 854 (Tex. 1995). As explained, Star Harbor withdrew the TPDES Application with prejudice in its entirety prior to any ruling by the ALJ. As a result, all issues that were litigated or could have been litigated in the TPDES Application hearing—including the Commissioners’ referred issues related to plant siting—are precluded from consideration in this or any other subsequent legal proceeding.

² The doctrine of *res judicata* does not preclude Star Harbor’s filing of a TLAP Application generally. The pattern and place of disposal proposed in the TLAP Application is substantially different from that requested in the TPDES Application. Those components of the TLAP Application were not and could not have been litigated or adjudicated in the TPDES Application hearing. But the issue of constructing a waste treatment facility on the proposed site was adjudicated. *See Mossler*, 818 S.W.2d at 754. Consequently, collateral estoppel precludes the plant-siting elements of the TLAP Application insofar as they are the same requests made in the TPDES Application. Essentially, if Star Harbor wants a TLAP, it needs to move the proposed plant site.

³ A copy of TCEQ’s Interim Order on the TPDES Application is enclosed as Exhibit B.

Therefore, the Commission should immediately return the TLAP Application to avoid further injustice to the Landowners.

Material Misrepresentations Result in Public Notice Failures

Perhaps the most critical deficiency of the TLAP Application is its falsification of property boundaries depicted on the Landowner Map, which Star Harbor included in Attachment 4 to the Application. A copy of the Landowner Map for the proposed facility and effluent pond site Star Harbor included in Attachment 4 is enclosed as Exhibit C to this comment letter.

The Application and Landowner Map include significant and material misrepresentations related to identifying potentially affected landowners. The Application and Landowner Map falsely assert that Star Harbor owns the land on which it proposes to construct the proposed facility and effluent holding pond. The Landowner Map depicts the immediate area around the facility and pond as constituting the "Applicant Property Boundary" when, in fact, the land is currently owned by the Tarrant Regional Water District ("TRWD"). As demonstrated by Attachment 2 to the Application, which falsely characterizes its contents as constituting a "Lease Agreement," Star Harbor and TRWD have agreed to a Memorandum of Understanding in which TRWD stated its intend to conditionally approve a draft easement for Star Harbor's use of the land. Attached to the MOU is an unexecuted draft easement. Attachment 2 affirmatively demonstrates that Star Harbor does not possess any property interest in the land it represents in Attachment 4 as being bound by the "Applicant Property Boundary." There has been no legal subdivision that would create the "Applicant Property Boundary" illustrated on the Landowner Map. Consequently, Attachment 4 incorrectly represents that the only landowner adjacent to the proposed facility and effluent pond site is TRWD.

The actual property boundary for the proposed facility and pond site is illustrated in the enclosed Exhibit D, which the Landowners obtained from the Henderson Central Appraisal District's official records. The boundary line of the TRWD property on which Star Harbor proposes to site the treatment facility and storage pond is illustrated as being adjacent to property owned by Don Norwood substantially north of the line drawn by Star Harbor in its Landowner Map. It is effectively the same line as the southern portion of Star Harbor's claimed "Property Boundary." Star Harbor has effectively declared that TRWD owns land that encroaches significantly onto Mr. Norwood's property, including over an unpaved access road used by Mr. Norwood to access a domestic groundwater wellhead.

Through this misrepresentation, Star Harbor created a fictitious strip of land that buffers its proposed facility site from Mr. Norwood's property. This is a particularly egregious abuse of TCEQ's process considering the fact that Star Harbor previously identified the Norwood family as having owned the same property on the Landowner Map attached to the TPDES Application.⁴ The TPDES Application, which again proposed to construct a treatment facility on the same site

⁴ At the time of the TPDES Application, the subject property was owned by Mr. Norwood's father. Ownership of the property was legally decided to Don Norwood on May 8, 2020.

currently proposed by the TLAP Application, affirmatively represented that the Norwoods were affected persons.⁵ The TPDES Application Landowner Map is enclosed as Exhibit E.

As a result of Star Harbor's misrepresentation, Don Norwood was not included on the Landowner List in TLAP Application Attachment 4. Consequently, the Chief Clerk did not include Mr. Norwood on its mailed notice list. This alone constitutes a critical failure of public notice under Water Code Chapter 5, Subchapter M that can only be cured through an amendment correcting the Landowner Map.

Additional TLAP Application Deficiencies

The Landowners raise the following additional issues related to the TLAP Application:

- Based on misrepresentations, the Chief Clerk's Notice of Application and Preliminary Decision for Water Quality Land Application Permit for Municipal Wastewater and the Executive Director's Preliminary Decision both incorrectly state that the "wastewater treatment facility and disposal site will be located in the drainage basin of Cedar Creek Reservoir in Segment No. 0818 of the Trinity River Basin. As illustrated in the USGS Topographic Map included as Attachment 15 to the TLAP Application, the treatment facility is proposed to be located in the Cedar Creek watershed below Cedar Creek Reservoir in Segment No. 0804 of the Trinity River Basin.
- Attachment 16, including amended versions of the same, fails to identify private groundwater wells within one mile of the proposed facility and effluent pond as requested by Water Quality Division staff on August 6, 2021, including at least five legally registered domestic water wells owned by the Landowners.
- Star Harbor failed to include all maps, diagrams, basis of design, calculations, and other pertinent data required under Chapter 309 of the Commission's Rules.
- Star Harbor did not include information required for design analysis, hydraulic application rates, and effluent storage calculations; the water balance study is based on incomplete data on crop systems, yearly rainfall, and consumptive use requirements.
- The TLAP Application includes deficient information on nitrogen application rates, soil testing, and irrigation best management practices.
- The proposed pattern and method of disposal will not adequately protect surface water quality and groundwater quality and will result in discharge to surface waters of the state.
- The plant and effluent pond siting in the TLAP Application fails to meet requirements in Chapter 309, Subchapter B, including inaccurate odor buffer zone information, inadequate pond lining requirements, and distance from private water wells.
- Considering the proximity of the proposed facility and effluent storage pond to surface water features owned by the Landowners, the effluent limits in the Draft Permit are inadequate and were improperly calculated under TCEQ's rules.

⁵ The TPDES Application Landowner Map actually omits the property immediately adjacent to the proposed plant. The Landowners reiterate, as they stated in 2019, that the Water Quality Division should not have declared the TPDES Application administratively complete without Star Harbor's correction of material deficiencies.

Ms. Laurie Gharis
November 15, 2021
Page 7

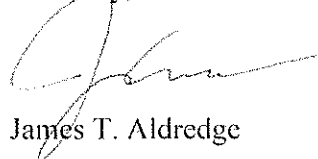
- The TLAP Application does not include adequate calculations for agronomic uptake of nutrients and other pollutants and, therefore, has not correctly identified suitable crop types for the disposal site.

Conclusion

Finally, the Landowners note that they have directly engaged with public officials and engineers representing Star Harbor in a continuing attempt to negotiate a resolution of this dispute. The Landowners' direct testimony in the TPDES Application asserted that the Landowners wish to be good neighbors and will proactively work with Star Harbor to find a mutually agreeable solution for Star Harbor's waste disposal needs. Notwithstanding the fact that Star Harbor, without consulting the landowners, refiled the same request to site a waste treatment plant as close to the Landowners' properties as possible, the Landowners are making good on their promise and hope that this matter can be resolved amicably. Star Harbor cannot, however, legally construct a waste treatment plant on the site they are currently proposing, and the Landowners will continue to assert all of their legal rights and claims until a competent adjudicative body enforces the law. The Landowners earnest hope is that, in lieu of settlement, the TCEQ will be that adjudicator.

The Landowners will provide any other information or insight that might be helpful to either TCEQ staff or Star Harbor's representatives upon request. Thank you for your consideration of these comments.

Sincerely,



James T. Aldredge

copy: Warren Claxton, Mayor, City of Star Harbor
Christina O'Jibway, Office of Senator Robert Nichols
Rick Carroll, Tarrant Regional Water District
Robert Sadlier, Director, Water Quality Division
Firoj Vahora, Municipal Permit Team Lead, Water Quality Division
Guy Henry, Acting Director, ELD
Todd Galiga, Senior Attorney, ELD
Michael Parr, Attorney, ELD
Vic McWherter, OPIC
David Berberian, Castell Realty LLC
Don Norwood

enclosures

Exhibit A

SOAH Order No. 5 Granting Motion to Withdraw and Remand Application

SOAH DOCKET NO. 582-19-6260
TCEQ DOCKET NO. 2019-0575-MWD

APPLICATION BY CITY OF STAR
HARBOR FOR TPDES PERMIT NO.
WQ0015666001 IN HENDERSON
COUNTY, TEXAS

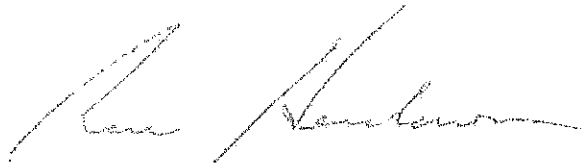
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BEFORE THE
STATE OFFICE OF
ADMINISTRATIVE HEARINGS

**ORDER NO. 5
GRANTING MOTION TO WITHDRAW AND REMAND APPLICATION**

On December 10, 2019, City of Star Harbor filed a motion to withdraw and remand its application with prejudice. It is therefore **ORDERED** that the Motion to Dismiss and Remand is **GRANTED**, that the hearing set for **January 21-23, 2020**, is **CANCELLED**, and that this matter is **DISMISSED** from the docket of the State Office of Administrative Hearings and **REMANDED** to the Executive Director of the Texas Commission on Environmental Quality who shall enter an order dismissing the application with prejudice pursuant to 30 Texas Administrative Code § 80.25(b).

SIGNED December 11, 2019.



ROSS HENDERSON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 504
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY: Environmental Quality, Texas Commission on (TCEQ)
STYLE/CASE: CITY OF STAR HARBOR
SOAH DOCKET NUMBER: 582-19-6260
REFERRING AGENCY CASE: 2019-0575-MWD

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
ALJ ROSS HENDERSON

REPRESENTATIVE / ADDRESS

PARTIES

ELI MARTINEZ
OFFICE OF PUBLIC INTEREST COUNSEL
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
MC-103 P.O. BOX 13087
AUSTIN, TX 78711
(512) 239-3974 (PH)
(512) 239-6377 (FAX)
eli.martinez@tceq.texas.gov

OFFICE OF PUBLIC INTEREST COUNSEL

MICHAEL T. PARR, II
STAFF ATTORNEY
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
ENVIRONMENTAL LAW DIVISION
MC 173 P.O. BOX 13087
AUSTIN, TX 78711-3087
(512) 239-0611 (PH)
(512) 239-0626 (FAX)
michael.parr@tceq.texas.gov

TCEQ

JAMES ALDREDGE
LLOYD GOSSELINK ROCHELL & TOWNSEND, P.C.
816 CONGRESS AVE., SUITE 1900
AUSTIN, TX 78701-2478
(512) 322-5859 (PH)
(512) 472-0532 (FAX)
jaldredge@lglawfirm.com

DON NORWOOD

CEDAR CREEK RANCH, LTD.

CASTELL REALTY, LLC

GEOFFREY P. KIRSHBAUM
TERRILL & WALDROP
810 W. 10TH ST
AUSTIN, TX 78701
(512) 474-9100 (PH)
(512) 474-9888 (FAX)
gkirshbaum@terriwwaldrop.com

CITY OF STAR HARBOR, TEXAS

Exhibit B

Interim Order on TPDES Application

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



AN INTERIM ORDER concerning the application by the City of Star Harbor for TPDES Permit No. WQ0014268002; TCEQ Docket No. 2019-0575-MWD.

On June 12, 2019, the Texas Commission on Environmental Quality (Commission) considered during its open meeting requests for hearing and reconsideration filed by Castell Realty, LLC; Cedar Creek Ranch, Ltd.; Don Norwood; and the City of Malakoff (collectively, Requestors) concerning the application by the City of Star Harbor for new TPDES Permit No. WQ0014268002 at a facility proposed to be located approximately 3,050 feet west of the intersection of Briarwood and FM 3062, and 3,500 feet south of the intersection of FM 3062 and Jupiter Road, Henderson County, Texas. The requests for hearing and reconsideration were evaluated under the requirements in the applicable statutes and Commission rules, including 30 Texas Administrative Code Chapter 55. The Commission also considered the responses to the requests for hearing and reconsideration filed by the Executive Director and Office of Public Interest Counsel; the Requestors' replies; all timely public comment; and the Executive Director's Response to Comment.

After evaluation of all relevant filings, the Commission determined that Castell Realty, LLC; Cedar Creek Ranch, Ltd.; Don Norwood; and the City of Malakoff are affected persons and granted their requests for hearing. The Commission determined to deny the Requestors' requests

for reconsideration. The Commission next determined whether the requests for hearing raised disputed issues of fact or mixed questions of fact and law that were raised by affected persons during the comment period, and which are relevant and material to the decision on the application. The Commission determined that the following issues met those requirements and directed that they be referred to the State Office of Administrative Hearings (SOAH) for contested case hearing:

- A) Whether the Applicant has a sufficient legal interest in the property proposed for the facility to submit an application for a permit under 30 TAC § 305.43(a);
- B) Whether the Applicant has adequately demonstrated a need for each phase of the draft permit;
- C) Whether issuance of the draft permit is contrary to the state's regionalization policy or Texas Water Code § 26.0282;
- D) Whether the proposed facility will cause nuisance odors, including compliance with any applicable buffer zone requirements;
- E) Whether the water quality uses of the receiving waters were correctly determined;
- F) Whether the proposed discharge will violate TCEQ antidegradation policy and procedures or negatively impact aquatic or terrestrial wildlife species; and
- G) Whether the proposed discharge will be protective of water quality under the applicable surface water quality standards in 30 Texas Administrative Code Chapter 307.

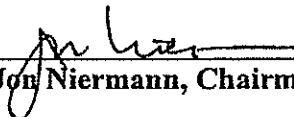
The Commission also determined to initially refer the matter to the TCEQ's Alternative Dispute Resolution (ADR) Program, concurrent with the SOAH preliminary hearing scheduling process. Finally, the Commission specified that the maximum duration of the contested case hearing shall be 180 days from the date of the preliminary hearing until the proposal for decision is issued by SOAH.

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY that:

- 1) The hearing requests of Castell Realty, LLC; Cedar Creek Ranch, Ltd.; Don Norwood; and the City of Malakoff are hereby GRANTED;
- 2) All requests for reconsideration are hereby DENIED;
- 3) The matter is hereby REFERRED to the TCEQ's ADR Program concurrent with the SOAH preliminary hearing scheduling process;
- 4) The following issues are referred to SOAH for a contested case hearing on the application:
 - A) Whether the Applicant has a sufficient legal interest in the property proposed for the facility to submit an application for a permit under 30 TAC § 305.43(a);
 - B) Whether the Applicant has adequately demonstrated a need for each phase of the draft permit;
 - C) Whether issuance of the draft permit is contrary to the state's regionalization policy or Texas Water Code § 26.0282;
 - D) Whether the proposed facility will cause nuisance odors, including compliance with any applicable buffer zone requirements;
 - E) Whether the water quality uses of the receiving waters were correctly determined;
 - F) Whether the proposed discharge will violate TCEQ antidegradation policy and procedures or negatively impact aquatic or terrestrial wildlife species; and
 - G) Whether the proposed discharge will be protective of water quality under the applicable surface water quality standards in 30 Texas Administrative Code Chapter 307.
- 5) All issues not identified as being referred to SOAH in Ordering Provision No. 4 are hereby DENIED;
- 6) The maximum duration of the hearing is set at 180 days from the date of the preliminary hearing until the date the proposal for decision is issued by SOAH; and

- 7) If any provision, sentence, clause or phrase of this Order is for any reason held to be invalid, the invalidity of any portion shall not affect the validity of the remaining portions of the Order.

**TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**



Jon Niermann, Chairman

6/18/19

Date Signed

Exhibit C

TLAP Application Landowner Map



WASTELINE
ENGINEERING, INC.

Attachment 4 – Affected Landowner Map

RECEIVED
JUL 14 2021
Water Quality Applications Team

NEW WWTP PERMIT
FOR
CITY OF STAR HARBOR

LANDOWNER INFORMATION

WASTELINE
ENGINEERING, INC.
Texas Registered Engineer
License # E-1669

Date: June 2021
Drawn by: J.A.F.
Designed by: G.B.
Project Job#: 221XX

ATTACHMENT
A4.1



0 200 400
GRAPHIC SCALE IN FEET

1: TARRANT REGIONAL WATER DISTRICT
800 E. NORTHSIDE DRIVE
FORT WORTH, TX 76102

150' BUFFER ZONE

APPLICANT PROPERTY BOUNDARY

PROPOSED FACILITY BOUNDARY

EFFLUENT HOLDING POND

COUNTY ROAD 3062

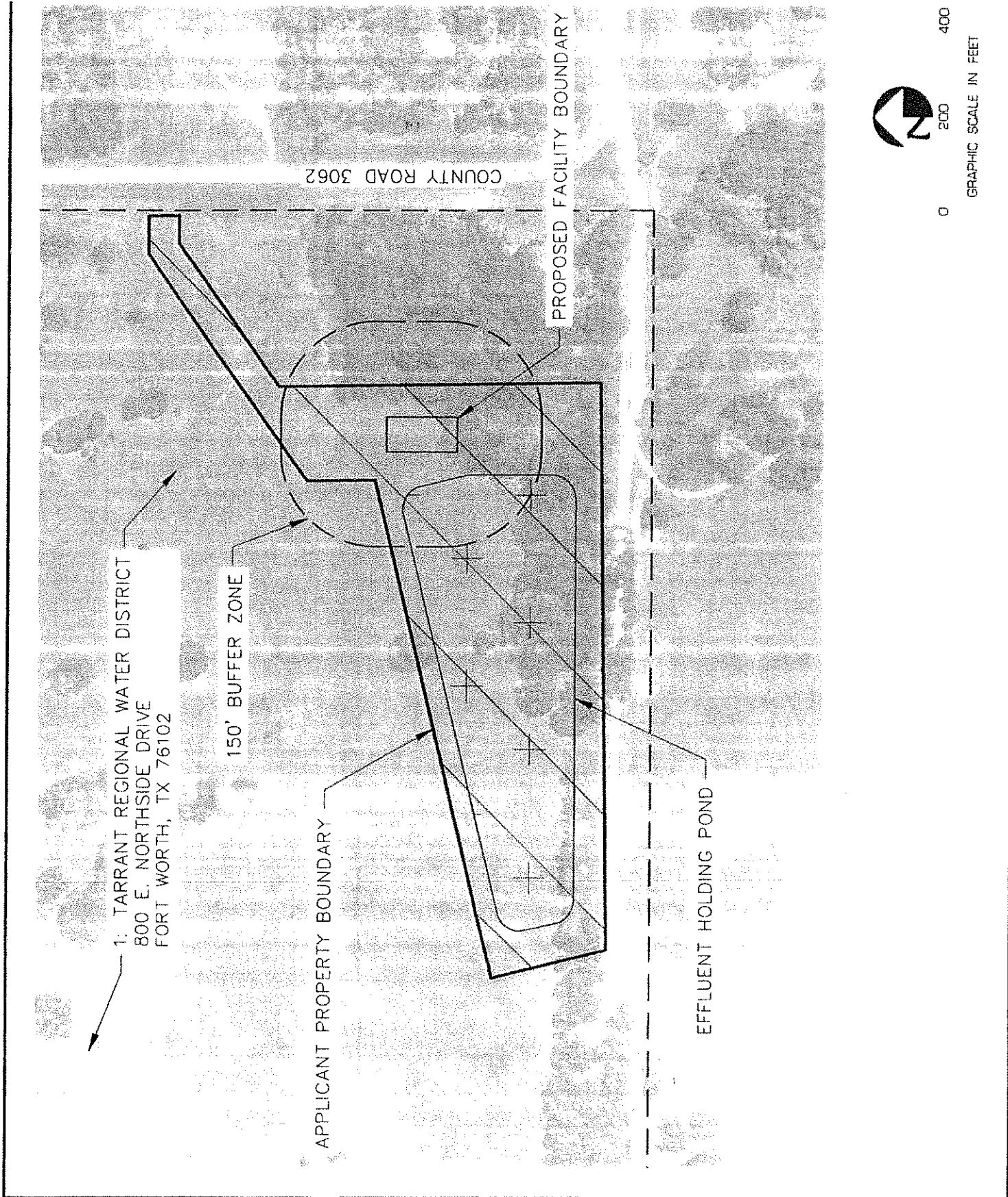


Exhibit D

Henderson Central Appraisal District Property Boundary Map



3007

3002

3052



Parcel Owner: NORWOOD DON C & LORI

[View More Property Information](#)

[Click here for GIS Schematic Data](#)

Property Information

Property ID: R19605

Legal Acreage: 135.00

GEO ID: 0755.0010.0A.00.60

Legal Description: AB 755 P TUMUL N EON

SUR TR 1A

Tract or Lot: TR 1A

Abstract Subdivision Code:

Block:

Neighborhood Code:

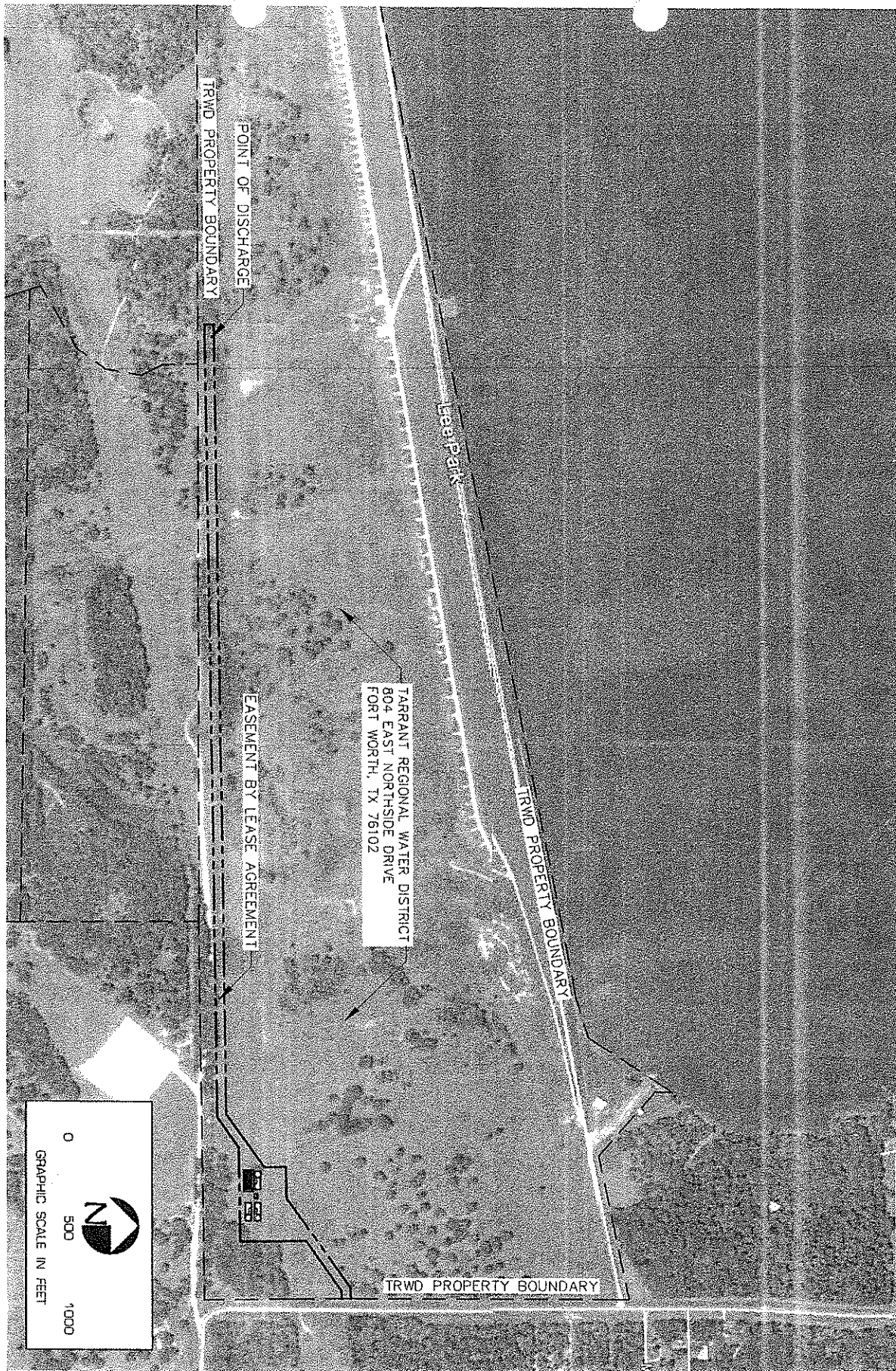
School District: ML

City Limits:

Zoom To

Exhibit E

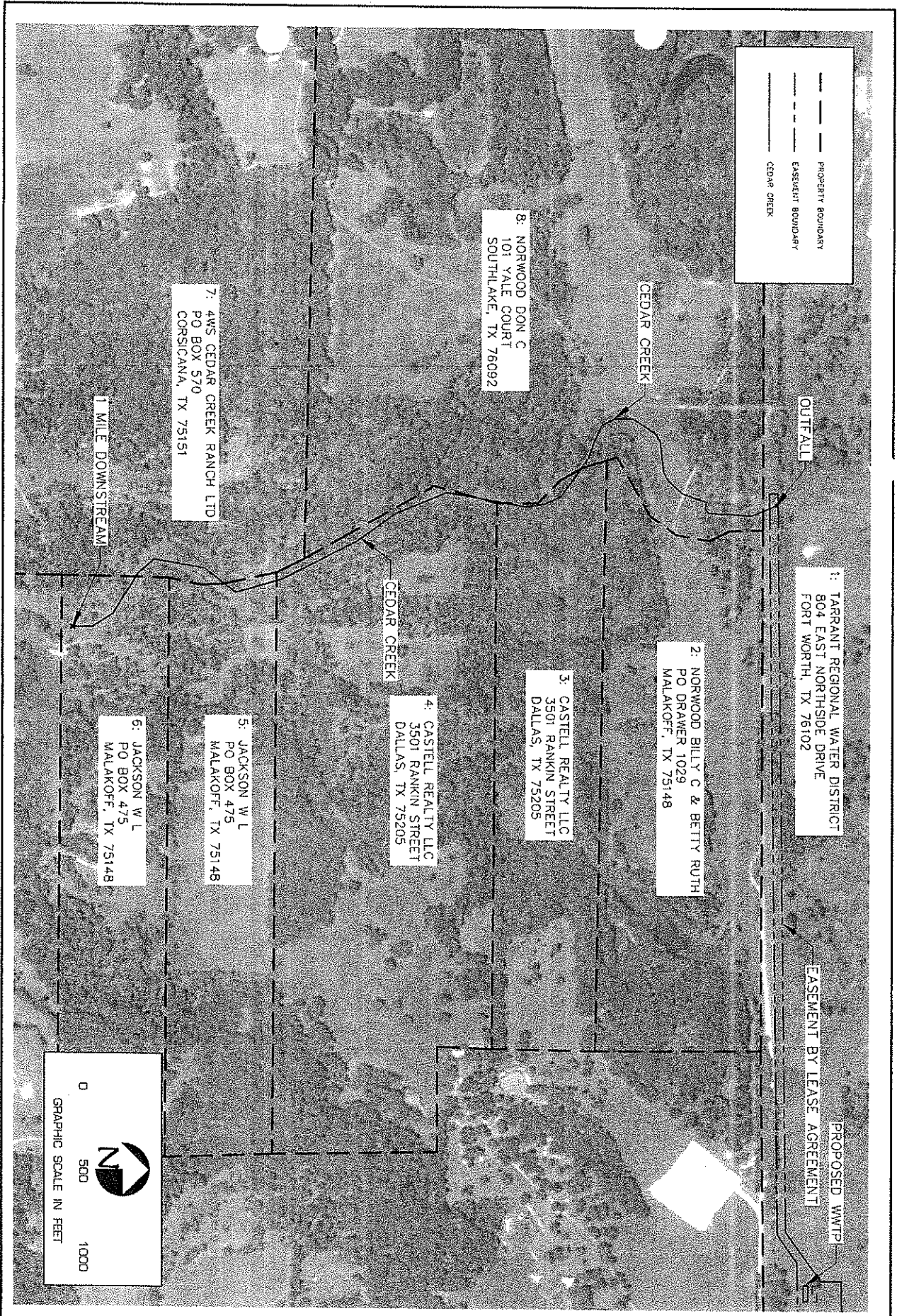
TPDES Application Landowner Map and List



Sheet: **1**
 of **1**
WWTP PERMIT APPLICATION
CITY OF STAR HARBOR
PROPERTY BOUNDARY INFORMATION


WASTELINE ENGINEERING, INC.
 208 S Front Street
 Alledo, Texas 76008
 (817) 441-1300
 (817) 441-1033 fax
 Texas Registered Engineering Firm #F-1669

Date: September 2017
 Drawn by: J.A.F.
 Designed by: G.B.
 QA: G.B.
 Project Job#: 21704



Sheet: **1**
of **1**

WWTP PERMIT APPLICATION
CITY OF STAR HARBOR

LAND OWNER INFORMATION

WASTELINE ENGINEERING, INC.

204 S Front Street
Aledo, Texas 76608
(817) 441-1300
(817) 441-1033 fax

Texas Registered Engineering Firm #F-1669

Date: September 2017
 Drawn by: J.A.F.
 Designed by: G.B.
 GA: G.B.
 Project Job#: 21704

Landowner List

#	Name	Address	City, State Zip
1	Tarrant Refional Water District	804 East Northside Drive	Fort Worth, Texas 76102
2	Norwood Billy C & Betty Ruth	PO Drawer 1029	Malakoff, Texas 75148
3	Castell Realty LLC	3501 Rankin Street	Dallas, Texas 75205
4	Castell Realty LLC	3501 Rankin Street	Dallas, Texas 75205
5	Jackson W L	PO Box 475	Malakoff, Texas 75148
6	Jackson W L	PO Box 475	Malakoff, Texas 75148
7	4WS Cedar Creek Ranch LTD	PO Box 570	Corsicana, Texas 75151
8	Norwood Don C	101 Yale Court	Southlake, Texas 76092