

TCEQ DOCKET NO. 2022-0738-IWD

APPLICATION BY	§	BEFORE THE
OXY VINYLs, LP	§	TEXAS COMMISSION ON
TPDES PERMIT NO. WQ0001539000	§	ENVIRONMENTAL QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Hearing Requests on an application by, Oxy Vinyls, LP. (Applicant) for a TPDES Permit No. WQ0001539000.

Attached for Commission consideration are the following:

Attachment A—Executive Director's Maps

II. FACILITY DESCRIPTION

The Applicant, which operates the Battleground chlor-alkali manufacturing facility producing caustic (sodium hydroxide), chlorine and hydrogen, has applied to the TCEQ for a major amendment of Texas Pollutant Discharge Elimination System TPDES Permit No. WQ0001539000 to authorize an increase in the discharge of treated wastewater at a volume not to exceed a daily average flow of 2,400,000 gallons per day via Outfall 001, and an increase in total copper, total lead, total nickel, total zinc and total suspended solids limits via Outfall 001. The draft permit authorizes the discharge of treated process wastewater, utility wastewaters, stormwater, and previously monitored effluent (treated domestic wastewater via Outfall 201) at a daily average flow not to exceed 2,400,000 gallons per day via Outfall 001, and stormwater commingled with de minimis quantities of process wastewater and utility wastewaters on an intermittent and flow-variable basis via Outfall 002. The Executive Director forwarded the Oxy Vinyls, LP draft permit to U.S. Environmental Protection Agency (EPA) on October 18, 2021. EPA approved the Oxy Vinyls, LP draft permit on November 23, 2021.

The Battleground chlor-alkali manufacturing facility is located on the east side of State Park Road 1836 (Vista Road) approximately 1,000 feet northeast of its intersection with State Highway 134 (Independence Parkway) in the City of La Porte, Harris County, Texas 77571. The treated effluent is discharged via Outfalls 001 and 002 to Phillips Ditch, thence to Santa Ana Bayou, thence to Houston Ship Channel/San Jacinto River Tidal in Segment No. 1005 of the San Jacinto River Basin.

The unclassified receiving water uses are minimal aquatic life use for the Phillips Ditch and high aquatic life use for the Santa Ana Bayou. The designated uses for Segment No. 1005 are non-contact recreation and high aquatic life use. Effluent limitations and conditions established in the proposed permit comply with state water quality standards and the applicable water quality management plan. The effluent limits in the proposed permit will maintain and protect the existing instream uses.

III. PROCEDURAL BACKGROUND

The TCEQ received the application on December 30, 2020, and declared it administratively complete on February 3, 2021. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in English in Houston Chronicle dba Pasadena Citizen on February 26, 2020, and in Spanish in Periódico Información February 26, 2020. The ED completed the technical review of the application on September 7, 2021, and prepared the proposed permit, which if approved, would establish the conditions under which the facility must operate. The Applicant published the Notice of Application and Preliminary Decision (NAPD) in English in Houston Chronicle dba Pasadena Citizen on November 10, 2021, and in Spanish in Periódico Información on November 11, 2021. The comment period for this application closed on December 13, 2021.

This application was filed on or after September 1, 2015; therefore, this application is subject to the procedural requirements adopted pursuant to House Bill (HB) 801, 76th Legislature (1999), and Senate Bill (SB) 709, 84th Legislature (2015), both implemented by the Commission in its rules in 30 TAC Chapter 39, 50, and 55. The Texas Legislature enacted Senate Bill 709, effective September 1, 2015, amending the requirements for comments and contested case hearings. This application is subject to those changes in the law.

The ED's Response to Comments and Final Decision were mailed on March 8th, 2022; the Hearing Request period ended April 7th, 2022.

IV. THE EVALUATION PROCESS FOR HEARING REQUESTS

HB 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. SB 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 ED, the Public Interest Counsel, and the Applicant may each submit written responses to a hearing request.¹

Responses to hearing requests must specifically address:

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

¹ 30 Texas Administrative Code (TAC) Section (§) 55.209(d).

- (7) a maximum expected duration for the contested case hearing.²

B. Hearing Request Requirements

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 ED's Response to Comment.³

A hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the 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;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law; and
- (5) provide any other information specified in the public notice of application.⁴

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

To grant a contested case hearing, the Commission must determine that a requestor is an "affected" person by conducting the following analysis:

² 30 TAC § 55.209(e).

³ 30 TAC § 55.201(c).

⁴ 30 TAC § 55.201(d).

- (a) 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.
- (b) Except as provided by § 55.103 of this title (relating to Definitions), governmental entities, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons.
- (c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:
 - (1) whether the interest claimed is one protected by the law under which the application will be considered;
 - (2) distance restrictions or other limitations imposed by law on the affected interest;
 - (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
 - (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
 - (5) likely impact of the regulated activity on use of the impacted natural resource by the person;
 - (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
 - (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.
- (d) In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the commission may also consider the following:
 - (1) 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;
 - (2) the analysis and opinions of the ED; and
 - (3) any other expert reports, affidavits, opinions, or data submitted by the ED, the applicant, or hearing requestor.
- (e) In determining whether a person is an affected person for the purpose of granting a hearing request for an application filed before September 1, 2015, the commission may also consider the factors in subsection (d) of this section to the extent consistent with case law.

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.”⁵ The Commission may not refer an issue to the State Office of Administrative Hearings (SOAH) for a contested case hearing unless the Commission determines that the issue:

⁵ 30 TAC § 50.115(b).

- (1) involves a disputed question of fact or a mixed question of law and fact;
- (2) was raised during the public comment period by an affected person whose hearing request is granted; and
- (3) is relevant and material to the decision on the application.⁶

V. ANALYSIS OF THE REQUESTS

The ED has analyzed the hearing request to determine whether it complies with Commission rules, if the requestor qualifies as an affected person, what issues may be referred for a contested case hearing, and what is the appropriate length of the hearing.

A. Whether the Requestors Complied With 30 TAC §§ 55.201(c) and (d) and 55.203

Bayou City Waterkeeper.

Affected Person: No

In addition to the requirements in 30 TAC § 55.201 and 30 TAC § 55.203, a request for a contested case hearing by a group or association on an application filed on or after September 1, 2015, must meet the requirements in 30 TAC § 55.205(b).

Bayou City Waterkeeper submitted timely comments on the Oxy Vinyls application in which they stated that their organization, “works with communities affected by flooding and water pollution across the Lower Galveston Bay watershed. We aim to hold industries to the standards set by the Clean Water Act, with the goal of protecting the waters that flow through our bayous, creeks, and neighborhoods into our coastal bays.” In their hearing request, they requested a hearing on specific issues related to anti backsliding, antidegradation, water quality, and human health. Based off the comments received, the ED determined that the interests Bayou City Waterkeeper seeks to protect are germane to the organization’s purpose and the relief they requested would not require the participation of the individual members in the case.

30 TAC § 55.205(b), however, also requires that the organization identify one or more members of the group or association would otherwise have standing to request a hearing in their own right. In their hearing request, Bayou City Waterkeeper failed to identify any member of the organization who had a justiciable interest that could be affected by this application. The only address the hearing request provided is 18 miles away from the nearest outfall and 22 miles away from the facility. Furthermore, it appears to be the organization’s physical address rather than any one particular member.

Therefore, as Bayou City Waterkeeper failed to identify any members of the association would otherwise have standing to request a hearing in their own right, the ED has determined that the Bayou City Waterkeeper has not met this this requirement for associational standing and should not be considered an affected person.

⁶ 30 TAC § 50.115(c).

B. Whether the Issues the Requestor Raised are Referable to the State Office of Administrative Hearings (SOAH).

1. Whether the major amendment violates the anti-backsliding principle. (RTC Response Nos. 1, 2, 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 violates the anti-backsliding principle, that information would be relevant and material to a decision on the application. The Executive Director recommends referring this issue to SOAH.

2. Whether the major amendment complies with the antidegradation policy under 30 Tex. Admin. Code § 307.5. (RTC Response Nos. 5 and 7).

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 antidegradation policy, 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 is adequately protective of water quality and public health by not including an effluent limit or monitoring requirement for mercury. (RTC Response Nos. 3 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 is not protective of water quality and public health, that information would be relevant and material to a decision on the application. The Executive Director recommends referring this issue to SOAH.

VI. CONCLUSION

The Executive Director recommends the following actions by the Commission:

1. The Executive Director recommends the Commission find that Bayou City Waterkeeper is not an affected person and deny their hearing request.
2. If referred to SOAH that the duration of the hearing be 180 days from the preliminary hearing to the presentation of a proposal for decision to the Commission.
3. If referred to SOAH, concurrently refer the matter to Alternative Dispute Resolution.
4. If referred to SOAH, refer the following issues as raised by the affected person as identified by the Executive Director:

Issue 1: Whether the major amendment violates the anti-backsliding principle;

Issue 2: Whether the major amendment complies with the antidegradation policy under 30 Tex. Admin. Code § 307.5;

and

Issue 3: Whether the draft permit is adequately protective of water quality and public health by not including an effluent limit or monitoring requirement for mercury.

Respectfully submitted,

Texas Commission on Environmental Quality

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Environmental Law Division



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REPRESENTING THE EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that on June 27, 2022, the "Executive Director's Response to Hearing Request" for TCEQ Permit WQ0001539000 for Oxy Vinyls, LP 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.



Harrison Cole Malley
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**MAILING LIST OXY VINYLs, LP
DOCKET NO. 2022-0738-IWD; PERMIT NO. WQ0001539000**

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REQUESTER(S):

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Attachment A

Oxy Vinyls, LP

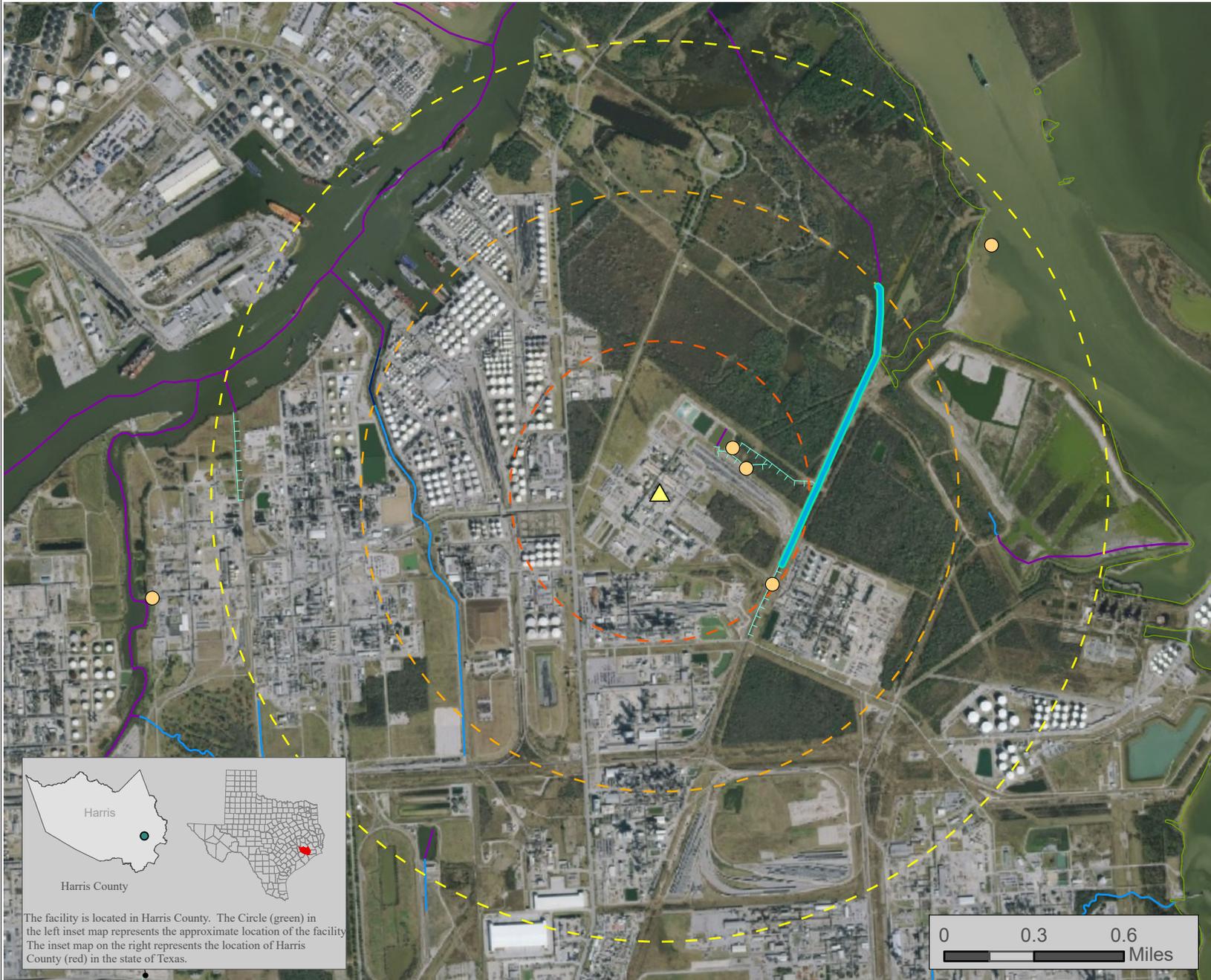
WQ0001539000

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



*Protecting Texas by
Reducing and
Preventing Pollution*

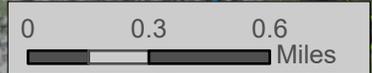
Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087
Date: 6/15/2022
CRF 0070252
Cartographer: jbartlin



- Outfalls
- 1 Mile Discharge
- Facility
- 0.5 Mile Radius
- 1 Mile Radius
- 1.5 Mile Radius



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



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.

Oxy Vinyls, LP

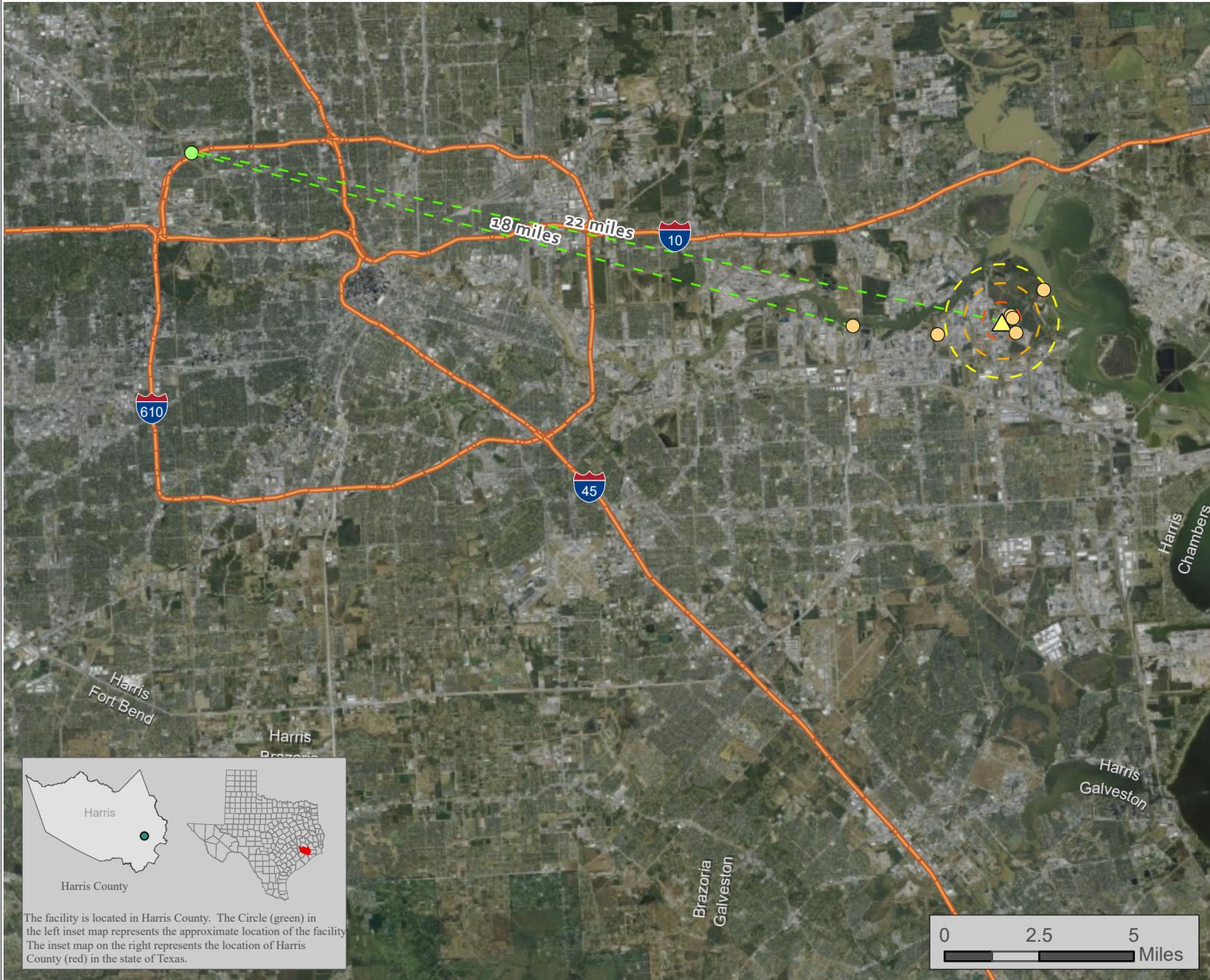
WQ0001539000

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

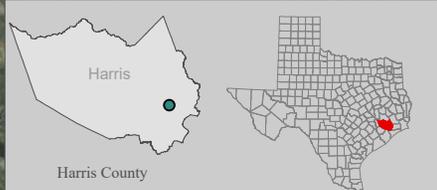


*Protecting Texas by
Reducing and
Preventing Pollution*

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Cartographer: jbartlin



- Outfalls
- Requestor
- Distance
- Facility
- 0.5 Mile Radius
- 1 Mile Radius
- 1.5 Mile Radius



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