

TCEQ DOCKET NUMBER 2022-1700-MWD

APPLICATION BY	§	BEFORE THE
PHAU-LOCKHART 450, LLC FOR NEW	§	TEXAS COMMISSION ON
TPDES PERMIT NO. WQ0016107001	§	ENVIRONMENTAL
	§	QUALITY

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EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

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**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Hearing Requests on the application by Phau-Lockhart 450, LLC (Applicant) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016107001 (the permit), authorizing the discharge of treated domestic wastewater at a daily average flow limit of 0.125/ 0.25/ 0.499 million gallons per day (MGD) in the Interim I/ Interim II/ Final phases, respectively, from the Clear Fork Ranch Wastewater Treatment Facility (proposed facility). Dana Garrett and Shalaina Walker filed timely Contested Case Hearing requests (Request).

**II. ATTACHMENTS FOR COMMISSION CONSIDERATION**

- Attachment A - ED's GIS Map

**III. DESCRIPTION OF FACILITY, RECEIVING STREAMS AND THE TECHNICAL REVIEW OF THE ED**

TCEQ Staff in the ED's Water Quality Division, (WQD staff) performed multiple analyses for the Technical Review of the proposed permit, including but not limited to, a Receiving Water Assessment performed by WQD staff on the Standards Implementation Team (Standards Team) and Water Quality Modeling runs by WQD staff in the Water Quality Assessment Section (Modeling Team) that used an "uncalibrated QUAL-TX" model. The Receiving Water Assessment, along with other available information, allowed the Standards Team to preliminarily determine the aquatic life uses in the area of the proposed discharge's impact and assigned the corresponding Minimum Dissolved Oxygen (DO) criterion as stipulated in the Texas Surface Water Quality Standards (TSWQS) (30 TAC § 307.5) and the TCEQ's *Implementation procedures for the Texas Surface Water Quality Standards-June 2010* (IPs).

For every new discharge, the Standards Team performs antidegradation analysis of the proposed discharge. Because the proposed discharge is directly to an unclassified water body, the Standards Team reviewed this permitting action in conformity with 30 TAC §§ 307.4(h) and (l) of the TSWQS and determined that Clear Fork Plum Creek, an unclassified waterbody, uses are high aquatic life use with a corresponding DO criterion of 5.0 mg/L DO. As with all determinations, reviews, or analyses related to the Technical review of the proposed permit, the above and below can be reexamined and subsequently modified upon receipt of new information or information that conflicts with the bases or assumptions employed in the applicable review, or analysis.

The designated uses for Segment No. 1810, as stated in the 2018 TSWQS-Appendix A (30 TAC § 307.10) are primary contact recreation, public water supply, aquifer protection, and high aquatic life use. The Standards Team, in accordance with the

TSWQS and the TCEQ's IPs, performed an Antidegradation Review of the receiving waters with the Tier 1 review preliminarily determining that existing water quality uses will not be impaired by the proposed discharge. The Tier 2 review preliminarily determined that no significant degradation of water quality is expected in Clear Fork Plum Creek, identified as having high aquatic life use. Numerical and narrative criteria protecting existing uses will be maintained with no significant degradation of water quality expected in waterbodies within the discharge route with exceptional, high, or intermediate aquatic life uses. Segment No. 1810 is not currently listed on the State's inventory of impaired and threatened waters (the 2020 CWA § 303(d) list).

The proposed permit's water quality-related effluent limitations (limits), established by WQD staff's uncalibrated QUAL-TX modeling results, will maintain and protect the existing instream uses. Similarly, conventional effluent parameters such as DO, Five-day Carbonaceous Biochemical Oxygen Demand (CBOD<sub>5</sub>), Total Suspended Solids (TSS), and Ammonia Nitrogen (NH<sub>3</sub>-N), are based on stream standards and waste load allocations for water quality-limited streams as found in the TSWQS and the State of Texas Water Quality Management Plan.

Based on the Modeling Team's results, limits for all flow phases of 10.0 mg/L CBOD<sub>5</sub>, 3.0 mg/L NH<sub>3</sub>-N, and 4.0 mg/L DO, based on a 30-day average, is predicted to ensure that DO will be maintained above the criterion established by the Standards Team for Clear Fork Plum Creek (5.0 mg/L DO). Coefficients and kinetics used in the model are a combination of site specific, standardized default, and estimated values.

The limits and conditions in the proposed permit meet requirements for secondary treatment and disinfection according to 30 TAC Chapter 309 (Subchapter A: Effluent Limits) and comply with the TSWQS (30 TAC §§ 307.1-.10, effective 7/22/2010), and the EPA-approved portions of the TSWQS (effective 3/6/2014). In a case such as this, end-of-pipe compliance with pH limits between 6.0 and 9.0 standard units reasonably assures instream compliance with pH criteria in the TSWQS when the discharge authorized is from a minor facility and the unclassified waterbodies have minimal or limited aquatic life uses. This technology-based approach reasonably assures instream compliance with TSWQS due to relatively smaller discharge volumes authorized by these permits. TCEQ sampling conducted throughout Texas indicating instream buffering quickly restores pH levels to ambient conditions, informs this conservative approach.

The discharge from the proposed permit is not expected to impact any federal endangered or threatened aquatic or aquatic dependent species or proposed species or their critical habitat. This determination is based on the United States Fish and Wildlife Service's (USFWS) biological opinion on the State of Texas authorization of the Texas Pollutant Discharge Elimination System (TPDES; September 14, 1998; October 21, 1998 updates). To make this determination for TPDES permits, TCEQ and EPA only considered aquatic or aquatic dependent species occurring in watersheds of critical concern or high priority as listed in Appendix A of the USFWS biological opinion. The determination is subject to reevaluation due to subsequent updates or amendments to the biological opinion. With respect to the presence of endangered or threatened species, the proposed permit does not require EPA's review.

#### **IV. PROCEDURAL BACKGROUND**

The TCEQ received the application on February 2, 2022, and declared it administratively complete on March 23, 2022. The Applicant published the Notice of

Receipt and Intent to Obtain a Water Quality Permit (NORI) in Caldwell County, Texas in the *Lockhart Post Register* on April 7, 2022. The ED completed the technical review of the application on May 18, 2022, and prepared the proposed permit, which if approved, would establish the conditions under which the proposed facility must operate. The Applicant published the Notice of Application and Preliminary Decision (NAPD) in Caldwell County, Texas in the *Lockhart Post Register* on June 23, 2022. The public comment period ended on July 25, 2022.

Because this application was received after September 1, 2015, and because it was declared administratively complete after September 1, 1999, it is subject to both the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999, (HB 801) and the procedural requirements of and rules implementing Senate Bill 709, 84<sup>th</sup> Legislature, 2015, (SB 709) both implemented by the TCEQ in its rules in 30 Texas Administrative Code (30 TAC) Chapters 39, 50, and 55. The Texas Legislature enacted Senate Bill 709, effective September 1, 2015, amending the requirements for comments and contested case hearings.

## **V. EVALUATION OF HEARING REQUESTS**

House Bill 801 established statutory procedures for public participation in certain environmental permitting proceedings, specifically regarding public notice and public comment and the Commission's consideration of hearing requests (Requests). The Commission implemented HB 801 by adopting procedural rules in 30 TAC chapters 39, 50, and 55. Senate Bill 709 revised the requirements for submitting public comment and the commission's consideration of Requests. This application was declared administratively complete on March 23, 2022; therefore, it is subject to the procedural requirements adopted pursuant to both HB 801 and SB 709.

### **A. Legal Authority to Respond to Hearing Requests**

The ED may submit written responses to Requests.<sup>1</sup> Responses to hearing requests must specifically address:

1. whether the requestor is an affected person;
2. whether issues raised in the hearing request are disputed;
3. whether the dispute involves questions of fact or law;
4. whether the issues were raised during the public comment period;
5. whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter by filing a written withdrawal letter with the chief clerk prior to the filing of the ED's Response to Comment;
6. whether the issues are relevant and material to the decision on the application; and
7. a maximum expected duration for the contested case hearing.<sup>2</sup>

### **B. Hearing Request Requirements**

To consider a Request, the Commission must first conclude that the requirements in 30 TAC §§ 55.201 and 55.203, are met as follows.

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<sup>1</sup> 30 TAC § 55.209(d).

<sup>2</sup> *Id.* at § 55.209(e).

A request for a contested case hearing by an affected person must be in writing, filed with the chief clerk within the time provided . . ., based only on the requester's timely comments, and not based on an issue that was 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.<sup>3</sup>

A hearing request must substantially comply with the following:

(1) give the name, address, 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 is responsible for receiving all official communications and documents for the group;

(2) identify the person's justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the 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 facility or activity in a manner not common to members of the general public;

(3) request a contested case hearing;

(4) for applications filed;

(B) on or after September 1, 2015, list all relevant and material disputed issues of fact that were raised by the requestor 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 the requestor's comments that the requestor disputes, the factual basis of the dispute, list any disputed issues of law; and

(5) provide any other information specified in the public notice of application.<sup>4</sup>

### **C. Requirement that Requestor be an Affected Person**

To grant a contested case hearing, the commission must determine, pursuant to 30 TAC § 55.203, that a requestor is an affected person.

(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 public does not qualify as a personal justiciable interest.

(b) 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;

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<sup>3</sup> 30 TAC § 55.201(c).

<sup>4</sup> *Id.* at § 55.201(d).

- (2) distance restrictions or other limitations imposed by law on the affected interest;
  - (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
  - (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
  - (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
  - (6) whether the requester timely submitted comments on the application which were not withdrawn; and
  - (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.<sup>5</sup>
- (d) In making this determination, the commission may also consider, to the extent consistent with case law:
- (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.<sup>6</sup>

#### **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 State Office of Administrative Hearing (SOAH) for a hearing.”<sup>7</sup> “The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue:

- (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; and
- (3) is relevant and material to the decision on the application.”<sup>8</sup>

#### **VI. ANALYSIS OF THE HEARING REQUESTS**

For this permit application the relevant public comment period ended on July 25, 2022, and the period for filing a Request for Reconsideration or a Request ended on October 31, 2022. The ED's analyses determined whether the Requests followed TCEQ rules, if Dana Garrett and Shalaina Walker qualify as affected persons, what issues may be referred for a possible hearing, and the length of that hearing.

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<sup>5</sup> 30 TAC § 55.203(a)-(c).

<sup>6</sup> *Id.* at § 55.203(d).

<sup>7</sup> 30 TAC § 50.115(b).

<sup>8</sup> *Id.* at § 50.115(c).

**A. Whether the Request Complied with 30 TAC §§ 55.201(c) and (d).**

1. **Dana Garrett** filed a timely, written Request that provided the requisite contact information, raised issues that form the basis of her Request in timely comments not withdrawn before the RTC was filed, and requested a hearing.

Ms. Garrett's Request complied with 30 TAC §§ 55.201(c), and (d) because it effectively identified a personal justiciable interest in a written explanation plainly describing why she believes she will be affected by the application in a way not common to the public. Ms. Garrett's Request stated she lives in proximity to the proposed facility and raised concerns about the possible adverse effects from the proposed facility and its discharge on water quality within the proposed discharge route, human health and wildlife, which are relevant issues to a decision on the application.

The ED recommends finding that Dana Garrett's Request substantially complied with 30 TAC §§ 55.201(c) and (d).

2. **Shalaina Walker** filed a timely, written Request that provided the requisite contact information, raised issues that form the basis of her Request in timely comments not withdrawn before the RTC was filed, and requested a hearing.

Ms. Walker's Request complied with 30 TAC §§ 55.201(c), and (d) because it effectively identified a personal justiciable interest in a written explanation plainly describing why she believes she will be affected by the application in a way not common to the public. Ms. Walker's Request stated she lives in proximity to the proposed facility and raised concerns about the possible adverse effects from the proposed facility on human health, and foul odors and an increase in pests from the proposed facility, which relevant issues to a decision on the application.

The ED recommends finding that Shalaina Walker's Request substantially complied with 30 TAC §§ 55.201(c) and (d).

**B. Whether Requestor is an Affected Person under 30 TAC § 55.203.**

1. **Dana Garrett** filed a Request that effectively identified a personal, justiciable interest affected by the application.

Ms. Garrett's Request stated that the proposed facility will be in proximity to her home, which according to the GIS map prepared by the ED's staff is only 0.51 linear miles from the proposed facility and is along the proposed discharge route within one stream-mile. This increases the likelihood that Ms. Garrett will be affected in a way not common to the general public. Ms. Garrett's Request raised relevant issues to a decision on the application, including whether the proposed facility and its discharge will adversely affect children that recreate in her spring creek and flora and fauna within the route of the proposed discharge, specifically the Whistling and Wood Ducks, Pileated Woodpeckers, Peacocks, Guineas, and Canadian and Egyptian Geese that use her property as a wildlife habitat.

Ms. Garrett's proximity, which was explained briefly and specifically, in plain language in her Request, and her concerns related to possible adverse effects on human health, surface and groundwater quality and flora and fauna from the proposed facility and its discharge, are issues related to the interests of the requestor, demonstrating a reasonable relationship exists between the interests

claimed and the activity regulated, which increases the likelihood Ms. Garrett will be personally affected in a way not common to the general public.

The ED recommends that the Commission find that Dana Garrett is an Affected Person under 30 TAC § 55.203.

2. **Shalaina Walker** filed a Request that effectively identified a personal, justiciable interest affected by the application. Her Request stated that the proposed facility will be in proximity to her home, which according to the GIS map prepared by the ED's staff is only 0.89 miles from the proposed facility. This increases the likelihood that Ms. Walker will be affected in a way not common to the general public. Ms. Walker's Request raised relevant issues to a decision on the application, including whether the proposed facility and its discharge will adversely affect human health, specifically her daughter's health, who is asthmatic, and whether the proposed facility will cause nuisance odors and an increase in pests.

Ms. Walker's proximity, which was explained briefly and specifically, in plain language in her Request, and her concerns related to odors from the proposed facility negatively affecting her daughter who has asthma and a possible increase in the amount of pests from the proposed facility, are issues related to the interests of the requestor, demonstrating a reasonable relationship exists between the interests claimed and the activity regulated, which increases the likelihood Ms. Walker will be personally affected in a way not common to the general public.

The ED recommends that the Commission find that Shalaina Walker is an Affected Person under 30 TAC § 55.203.

### **C. Whether the Issues are Referable to SOAH**

In addition to recommending to the Commission those persons who qualify as affected persons, the ED analyzes issues raised in accordance with regulatory criteria. Unless otherwise noted, the issues discussed below are considered relevant, disputed, and were raised during the public comment period and addressed in the ED's RTC. None of the issues were raised solely in a comment which has been withdrawn. For applications submitted on or after September 1, 2015, only those issues raised in a timely comment by a requester whose request is granted may be referred.<sup>9</sup>

#### **Issues raised in the Hearing Request:**

The following issues were raised in Ms. Garrett's and Ms. Walker's Requests:

1. **Whether the draft permit will protect human health and the environment.**

(RTC Response No. 2) These are issues of fact. If it can be shown that these issues are factually accurate, that information would be relevant and material to a decision on the application.

The ED concludes these issues are relevant and material, and if this case is referred to SOAH, the ED recommends the Commission refer these issues.

2. **Whether the draft permit will protect aquatic life and flora and fauna within the route of the proposed discharge.**

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<sup>9</sup> Tx. Gov'T CODE § 2003.047(e-1); 30 TAC § 55.211 (c)(2)(A)(ii).

(RTC Response Nos. 2 and 3) These are issues of fact. If it can be shown that these issues are factually accurate, that information would be relevant and material to a decision on the application.

The ED concludes these issues are relevant and material, and if this case is referred to SOAH, the ED recommends the Commission refer these issues.

**3. Whether the draft permit will be protective of surface and groundwater quality.**

(RTC Response Nos. 2 and 3) These are issues of fact. If it can be shown that these issues are factually accurate, that information would be relevant and material to a decision on the application.

The ED concludes these issues are relevant and material, and if this case is referred to SOAH, the ED recommends the Commission refer these issues.

**4. Whether the draft permit will prevent the impairment of the existing uses of the waterbodies within the route of the proposed discharge.**

The ED concludes this issue is relevant and material, and if this case is referred to SOAH, the ED recommends the Commission refer this issue.

**5. Whether the draft permit's nuisance controls comply with TCEQ rules.**

(RTC Response Nos. 4 and 5) This is an issue of fact. If it can be shown that this issue is factually accurate, that information would be relevant and material to a decision on the application.

The ED concludes this issue is relevant and material, and if this case is referred to SOAH, the ED recommends the Commission refer this issue.

**6. Whether proposed facility will adversely affect property values.**

(RTC Response No. 6) This is an issue of fact that is not relevant or material to a decision on the application, as the ED has no authority to address property values in her review of a wastewater permit application.

The ED concludes this issue is not relevant and material, and if this case is referred to SOAH, the ED recommends the Commission not refer this issue.

**VII. CONTESTED CASE HEARING DURATION**

If the Commission grants a hearing on this application, the ED recommends that the duration of the hearing be 180 days from the preliminary hearing to the presentation of a proposal for decision to the Commission.

**VIII. EXECUTIVE DIRECTOR'S RECOMMENDATION**

The ED recommends the following actions by the Commission:

1. Find that Dana Garrett and Shalaina Walker are Affected Persons under 30 TAC § 55.203.
2. Grant the Requests of Dana Garrett and Shalaina Walker.
3. Should the Commission decide to refer this case to SOAH:
  - a. refer the case to Alternative Dispute Resolution for a reasonable time; and
  - b. refer the identified issues above in section (C)(1)-(5) to SOAH for a contested case hearing.



Respectfully submitted,

Texas Commission on Environmental Quality

Erin Chancellor  
Interim Executive Director

Charmaine Backens, Acting Director  
Office of Legal Services

Guy Henry, Acting Deputy Director  
Environmental Law Division



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Michael T. Parr II, Staff Attorney  
Environmental Law Division  
State Bar No. 24062936  
P.O. Box 13087, MC 173  
Austin, Texas 78711 3087  
Telephone No. 512-814-5558

REPRESENTING THE  
EXECUTIVE DIRECTOR OF  
THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**CERTIFICATE OF SERVICE**

I certify that on January 12, 2023, true and correct copies of the Executive Director's Response to Hearing Requests on the application by Phau-Lockhart 450, LLC for new TPDES Permit No. WQ0016107001, was filed with the TCEQ's Chief Clerk and a copy was served to all persons listed on the attached mailing list via hand delivery, electronic delivery, inter-agency mail, or by deposit in the U.S. Mail.



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Michael T. Parr II, *Staff Attorney*  
Environmental Law Division  
State Bar No. 24062936

**MAILING LIST**  
**PHAU - LOCKHART 450, LLC**  
**DOCKET NO. 2022-1700-MWD; PERMIT NO. WQ0016107001**

FOR THE APPLICANT  
via electronic mail:

Nick McIntyre, VP Land  
Phau-Lockhart 450, LLC  
9000 Gulf Freeway  
Houston, Texas 77017  
Tel: (713) 948-7841  
[nick.mcintyre@perryhomes.com](mailto:nick.mcintyre@perryhomes.com)

Ian Clements, P.E. Kimley-Horn  
5301 Southwest Parkway  
Building 3, Suite 100  
Austin, Texas 78735  
Tel: (737) 241-9266  
[ian.clements@kimley-horn.com](mailto:ian.clements@kimley-horn.com)

FOR THE EXECUTIVE DIRECTOR  
via electronic mail:

Michael Parr, Staff Attorney  
Texas Commission on Environmental  
Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711  
Tel: (512) 239-0611  
[michael.parr@tceq.texas.gov](mailto:michael.parr@tceq.texas.gov)

Ashiqur Rahman, Technical Staff  
Texas Commission on Environmental  
Quality  
Water Quality Division, MC-148  
P.O. Box 3087  
Austin, Texas 78711  
Tel: (512) 239-4547  
Fax: (512) 239-4430  
[ashiqur.rahman@tceq.texas.gov](mailto:ashiqur.rahman@tceq.texas.gov)

Ryan Vise, Deputy Director  
Texas Commission on Environmental  
Quality  
External Relations Division  
Public Education Program, MC-108  
P.O. Box 13087  
Austin, Texas 78711  
Tel: (512) 239-4000  
Fax: (512) 239-5678  
[pep@tceq.texas.gov](mailto:pep@tceq.texas.gov)

FOR PUBLIC INTEREST COUNSEL  
via electronic mail:

Garrett T. Arthur, Public Interest Counsel  
Texas Commission on Environmental  
Quality  
Public Interest Counsel, MC-103  
P.O. Box 13087  
Austin, Texas 78711  
Tel: (512) 239-6363  
Fax: (512) 239-6377  
[garrett.arthur@tceq.texas.gov](mailto:garrett.arthur@tceq.texas.gov)

FOR ALTERNATIVE DISPUTE RESOLUTION  
via electronic mail:

Kyle Lucas  
Texas Commission on Environmental  
Quality  
Alternative Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711  
Tel: (512) 239-0687  
Fax: (512) 239-4015  
[kyle.lucas@tceq.texas.gov](mailto:kyle.lucas@tceq.texas.gov)

FOR THE CHIEF CLERK:

Docket Clerk  
Texas Commission on Environmental  
Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711  
Tel: (512) 239-3300  
Fax: (512) 239-3311  
[www.tceq.texas.gov/goto/efilings](http://www.tceq.texas.gov/goto/efilings)

REQUESTER(S)/INTERESTED PERSON(S):  
See attached list

REQUESTER(S):

Dana Garrett  
1893 Borchert Loop  
Lockhart, Texas 78644-4800

Shalaina Walker  
3575 Borchert Loop  
Lockhart, Texas 78644-4826

WITHDRAW OF REQUEST(S):

Justin C. Adkins  
Guadalupe Blanco River Authority  
933 East Court Street  
Seguin, Texas 78155-5819

Courtney Kerr-Moore  
Guadalupe Blanco River Authority  
933 East Court Street  
Seguin, Texas 78155-5819

# Attachment A

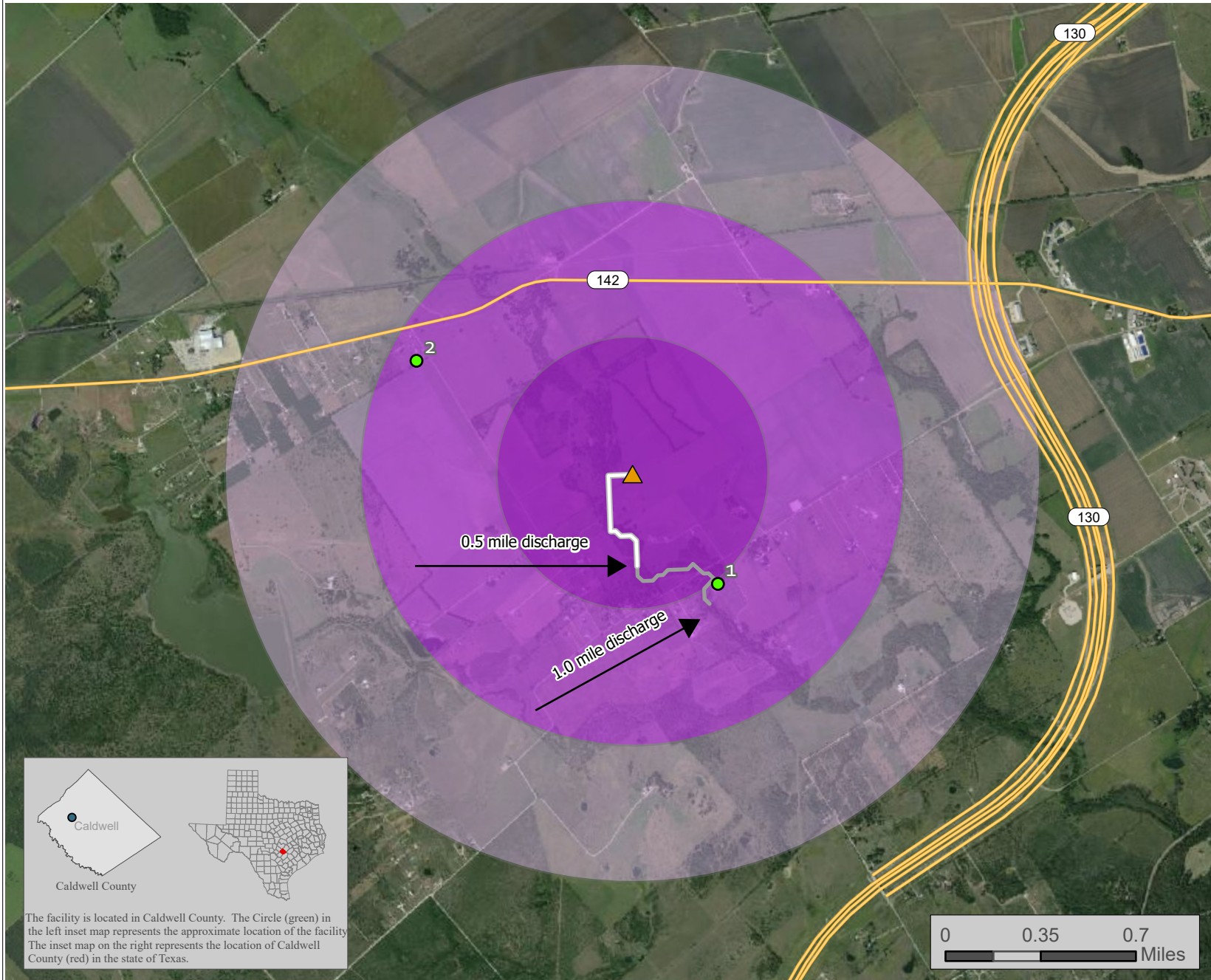
# PhauLockhart 450

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



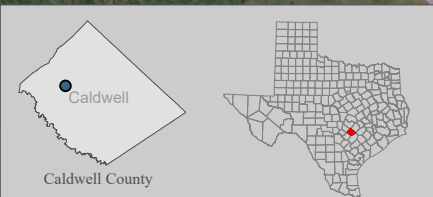
*Protecting Texas by  
Reducing and  
Preventing Pollution*

Texas Commission on Environmental Quality  
GIS Team (Mail Code 197)  
P.O. Box 13087  
Austin, Texas 78711-3087  
Date: 1/4/2023  
CRF 0080853  
Cartographer: jbartlin

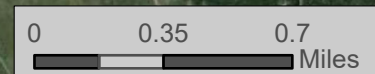


- Facility
- Requestors
- 0.5 Mile Radius
- 1.0 Mile Radius
- 1.5 Mile Radius
- 0.5 Mile Discharge
- 1.0 Mile Discharge

.51 miles from the facility to  
Dana Garrett (1)  
.89 miles from the facility to  
Shalaina Walker (2)



The facility is located in Caldwell 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 Caldwell 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.