

TCEQ DOCKET NO. 2023-0325-MWD

**APPLICATION BY HARRIS COUNTY § BEFORE THE TEXAS COMMISSION
MUNICIPAL UTILITY DISTRICT FOR § ON
A MAJOR AMENDMENT TO TPDES § ENVIRONMENTAL QUALITY
PERMIT NO. WQ0015264001**

**APPLICANT’S RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING
AND REQUEST FOR RECONSIDERATION**

TO THE HONORABLE COMMISSIONERS:

Harris County Municipal Utility District No. 171 (“Applicant” or “HCMUD 171”), the applicant in this matter, files its Response to Requests for Contested Case Hearing in the above-referenced matter. In support of the same, HCMUD 171 respectfully shows the following.

INTRODUCTION

Applicable law requires the Texas Commission on Environmental Quality (the “Commission”) to deny all hearing requests filed in this matter and approve HCMUD 171’s application for a major amendment to Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0015264001 (the “Application”). The Texas Water Code expressly prohibits the Commission from granting a request for a contested case hearing unless the Commission determines the request was filed by an affected person. An “affected person” is one who has a personal justiciable interest affected by the Application—i.e., a concrete and particularized injury that is likely to be redressed by a favorable outcome in a contested case hearing. An interest common to members of the general public does not qualify as a personal justiciable interest.

Four individuals filed hearing requests in this matter—James Donnelly, Gregory Johnston, Christopher Spicer, and Donnisha Spicer. While each of these individuals is identified on the landowner list included as Attachment 3b to the Application, and while each hearing request was timely submitted and adheres to TCEQ’s procedural rules for hearing requests, none of the

landowners has demonstrated a personal justiciable interest in the Application and the ED's Preliminary Decision under applicable rules and the TPDES amendment application.

There appears to be confusion in the record about which wastewater treatment plant ("WWTP") is the subject of this hearing. Christopher Spicer provided a map illustrating the location of his property relative to a different facility than the one at issue in this matter. The identified facility is, in fact, owned and operated by Harris County MUD No. 495 under TPDES Permit No. WQ0015222002. A major amendment application for that permit is also currently pending before the Commission.

The Executive Director ("ED") has preliminarily decided that the Application meets all applicable state and federal legal and technical requirements. Because no affected person has requested a hearing, the Commission should grant the Application and decide to issue the proposed major amendment to TPDES Permit No. WQ0015264001 at its public meeting on April 12, 2023.

RESPONSE TO HEARING REQUESTS

The Commission may hold a public hearing on a TPDES application only if a commissioner, the ED, or any affected person requests a hearing.¹ Otherwise, the Commission may act on a properly noticed TPDES application without holding a public hearing.² If a contested case hearing is requested by a person other than a commissioner or the ED, certain threshold determinations must be made before holding a hearing. Specifically, the Commission must first determine whether the requestor has satisfied all applicable procedural requirements and qualifies as an affected person authorized by law to request such a hearing.³

¹ Tex. Water Code § 26.028(c).

² *Id.* § 26.028(h).

³ *Texas Comm'n on Env'tl. Quality v. City of Waco*, 413 S.W.3d 409, 410 (Tex. 2013).

1. The Texas Water Code and Commission Rules, as construed by Texas courts, provide a narrow standard for a hearing requestor to be considered an affected person.

Section 26.028 of the Texas Water Code authorizes only the Commission, the ED, and affected persons to request a hearing on a TDPEs application.⁴ Section 5.556 of the Texas Water Code prohibits the Commission from granting a hearing request filed by a person other than the Commission or the ED unless the Commission determines that the request was filed by an affected person as defined by Section 5.115.⁵ That Section defines “affected person” as “a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing,” clarifying that “[a]n interest common to members of the general public does not qualify as a personal justiciable interest.”⁶

Texas courts have narrowed this standard even further by stating that the affected person standard in Section 5.115 requires requestors to establish standing by showing a concrete and particularized injury in fact, not common to the general public, that is

- (1) actual or imminent;
- (2) fairly traceable to the issuance of the permit as proposed; and
- (3) likely to be redressed by a favorable decision on its complaint.⁷

Section 5.115 also requires the Commission to adopt rules (each a “Rule,” and collectively, the “Rules”) specifying factors to be considered in determining whether a requestor is an affected

⁴ Tex. Water Code § 26.028(c).

⁵ *Id.* § 5.556(b) (“The commission may not grant a request for a contested case hearing unless the commission determines that the request was filed by an affected person as defined by Section 5.115.”), .115 (Providing, among other things, that the Commission shall adopt rules governing that determination.); 30 Tex. Admin. Code § 55.201(b) (Only the Commission, ED, applicant, or “affected persons, when authorized by law” may request a contested case hearing.).

⁶ *Id.* § 5.115(a); *see also* Tex. Gov’t Code §§ 2001.002, .051, .058, .081-.088 (Administrative Procedure Act general provisions applicable to contested case hearings); 2003.047 (State Office of Administrative Hearings procedural and substantive requirements for TCEQ permit hearings).

⁷ *Sierra Club v. Texas Comm’n on Env’tl. Quality*, 455 S.W.3d 214, 221 n.6 (quoting *City of Waco*, 413 S.W.3d at 417).

person.⁸ Pursuant to that requirement, the Commission has adopted Rules 55.201 and 55.203.⁹ Rule 55.201 provides that only the following may request a contested case hearing on a TPDES amendment application:

- (1) the Commission itself;
- (2) the ED;
- (3) the applicant; and
- (4) affected persons, when authorized by law.¹⁰

If the Commission determines that a hearing requestor is an affected person, the Commission is limited in the issues it may refer to a hearing. Under Section 5.556, the Commission may not refer an issue unless the Commission determines that the issue:

- (1) involves a disputed question of fact;
- (2) was raised during the comment period; and
- (3) is relevant and material to the decision on the application.¹¹

As explained in detail below, none of the hearing requests in this matter satisfies the applicable statutory and administrative requirements in a way that shows that any request was filed by an affected person. Thus, although the requestors have satisfied the applicable *procedural* requirements, those requests cannot be referred to hearing because they were not filed by affected persons.¹²

Commission Rules promulgated under the Texas Water Code also provide strict procedural standards for hearing requests. Contested case hearing requests must be timely filed, in writing,

⁸ Tex. Water Code § 5.115(a).

⁹ 24 Tex. Reg. 9015 (1999).

¹⁰ 30 Tex. Admin. Code § 55.201(b); *see also id.* § 55.200 (stating applicability of Subchapter F to applications filed under Texas Water Code Chapter 26.)

¹¹ Tex. Water Code § 5.556(d).

¹² *See id.* § 5.556(c).

and based only on timely comments filed by the requestor.¹³ A hearing request must also substantially comply with Rule 55.201, which requires a requestor to do the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (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; and
- (4) 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.¹⁴

Hearing requests must also provide any other information specified in the public notice of application.¹⁵ In effect, this procedural Rule exists to require persons requesting a hearing to provide sufficient information for the Commission to make the substantive affected person determination required by Section 5.556.

If a hearing request sufficiently explains how and why the requestor's personal justiciable interest is affected by the Application, the Commission must determine whether the interest claimed is, in fact, affected, considering all factors including 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 the use of property of the person;

¹³ *Id.* § 55.201(c); *see* Tex. Gov't Code § 2003.047(e-1).

¹⁴ 30 Tex. Admin. Code § 55.201(d) (Section 55.201(d)(4)(B) provides the following guideline: "To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law[.]").

¹⁵ *Id.*

- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.¹⁶

In summary, if not filed by the Commission, the ED, or the permit applicant, the Commission may not grant a request for a contested case hearing unless it determines that the request was properly filed by an affected person as defined by Section 5.115, Water Code.¹⁷ Thus, the Commission may only refer an application to a contested case hearing after first determining the following:

- (1) a hearing requestor has timely submitted a request that substantially complies with the requirements of Rule 55.201;
- (2) the requestor has a personal and justiciable interest related to the application that is actually redressable by Commission action; and
- (3) the interest claimed is not common to members of the general public.¹⁸

Finally, the Commission's evaluation of a request for a contested case hearing in light of the above-listed factors is not itself a contested case hearing subject to the Administrative Procedure Act codified in Chapter 2001 of the Texas Government Code, and the Commission may decide to deny hearing requests through a less formal proceeding.¹⁹

2. Applicable statutes and Commission Rules effectively create a three-pronged standard for determining whether a hearing request was filed by an affected person.

Assuming all procedural requirements have been met, to grant a hearing request and refer the Application to a contested case hearing, applicable statutes and rules require the Commission to determine that a hearing request claims or identifies the following:

¹⁶ 30 Tex. Admin. Code § 55.203(c).

¹⁷ Tex. Water Code § 5.556(c).

¹⁸ *Id.* §§ 5.115, .556, 26.028(h); 30 Tex. Admin. Code §§ 55.201, .203.

¹⁹ Tex. Water Code § 55.211; *City of Waco*, 413 S.W.3d at 423 (citing *Collins v. Texas Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 884–85 (Tex. App.—Austin 2002, no pet.)).

- (1) an interest that is personal to the hearing requestor (*i.e.* not common to members of the general public);²⁰
- (2) an interest that is justiciable (*i.e.* a concrete and particularized injury-in-fact that is within the Commission’s jurisdiction and redressable by a hearing);²¹ and
- (3) how and why the claimed interest is affected by the Application.²²

If a hearing request does not meet all three of those requirements, Texas law requires the Commission to deny it.²³

None of the hearing requests submitted in this matter demonstrates a justiciable interest in the Application. The Applicant identified four individual hearing requestors, all of whom filed multiple hearing requests. Each requestor claimed an interest that falls within one of the criteria listed in Rule 55.203, which lists factors to be considered by the Commission in making its affected person determination. The claimed interests in the requests, however, do not demonstrate any concrete or particularized injury to the requestor that could be redressed if the Commission were to conduct a contested case hearing. Specifically, the hearing requestors all identified their location as being upstream of the discharge route required to be illustrated in Domestic Administrative Report 1.1 included in the Application. Further, all properties identified by the requestors are not adjacent to the property on which the facility is located.

3. The hearing requests do not identify any personal justiciable interest that is relevant or material to the Commission’s decision on the Application.

In general, some of the interests identified in the hearing requests—e.g. odors, effects on aquatic use in the receiving stream—are protected by laws under which the Commission is considering the Application. However, due to the location of the requestor’s properties relative to the property on which the WWTP is located and the discharge route, the governing law does not

²⁰ Tex. Water Code § 5.115; 30 Tex. Admin. Code § 55.201(d).

²¹ *Sierra Club*, 455 S.W.3d at 221 n.6; Tex. Water Code § 5.115; 30 Tex. Admin. Code § 55.201(d).

²² 30 Tex. Admin. Code § 55.201(d).

²³ Tex. Water Code § 5.556.

extend to the requestor's locations. Consequently, the interests claimed do not meet any of the three prongs of the *Sierra Club* test. Specifically, there is no identified injury that, as a practical matter, can be (1) actual or imminent; (2) fairly traceable to the issuance of the amendment as proposed; or (3) likely to be redressed by a favorable decision by the Commission.²⁴ The Commission's decision to grant the Application and issue the requested major amendment will not affect the four requestors any more or less than if the Commission entirely denied the Application.

Page 14 of Domestic Administrative Report 1.1 included with the Application requires applicants to include a landowners map that includes, among other things, the applicant's property boundaries and the property boundaries of all landowners surrounding the applicant's property. In accordance with those instructions, the Applicant included Attachment 3a, which identifies the property on which the facility is located, an adjacent tract of land owned by the Applicant, and properties owned by the hearing requestors that are adjacent to the Applicant's property, but that are not adjacent to the property on which the facility is situated.

Separately, Domestic Administrative Report 1.1 requires applicants to include a list with the landowners' names and mailing addresses cross-referenced to the landowner's map. The Applicant complied with that requirement by including Attachment 3b. While all of the hearing requestors were identified in Attachment 3b, the properties owned by the requestors are adjacent only to property owned by the Applicant that is unrelated to the treatment facility.

Attached to this Response is a map similar to Attachment 3a that shows the property boundaries of the respective parties and the requestor's locations along with distances relative to the WWTP site and the discharge route. The WWTP property is illustrated in red. All other

²⁴ See *Sierra Club*, 455 S.W.3d at 221 n.6; see also *City of Waco*, 413 S.W.3d at 417.

property boundaries are illustrated in black. Flow directions are illustrated in yellow and red. And straight-line distances are illustrated in black.

The attached map shows that the WWTP is located on property along Beckendorff Road approximately 1,870 feet north of the confluence of the immediate receiving stream and South Mayde Creek. South Mayde Creek runs west to east along the northern boundaries of the requestors' respective properties. The closest requestor's property is approximately 1,588 feet upstream of the confluence at its closest point to the confluence. Once the discharged effluent flows into South Mayde Creek, the creek then flows away from the requestors' respective properties. HCMUD 171 owns a separate tract of land that runs alongside the west and east banks of the discharge route southward all the way to the confluence. As the crow flies, the closest requestor's property is approximately 2,347 feet southwest of the outfall, which is the closest component of the WWTP to the requestors.

The requestors are all hydrologically upstream of the discharge route. The discharged effluent physically cannot run onto or adjacent to the requestor's property. The closest requestor is nearly a half-mile from the WWTP. None of the requestors' properties is adjacent to the property on which the Applicant's WWTP is located.

For these reasons, the personal interests identified by the four hearing requestors are not justiciable because they are not relevant or material to the issues the Commission would consider if it conducted a contested case hearing and are therefore not redressable by the Commission.²⁵ In its review of the Application, the Commission evaluates potential effects of the proposed major amendment on land and aquatic uses adjacent to and downstream of the WWTP location and

²⁵ See 30 Tex. Admin. Code § 55.201(b)

outfall. As illustrated on the attached map, and as affirmatively demonstrated in each of the hearing requests, the requestors' respective properties are simply not located in an area that can be affected by the proposed flow increase.

The Applicant notes that the requestors may be expressing concerns in this docket about potential affects to their property interests by a neighboring WWTP that is not owned or operated by HCMUD 171. In his hearing request, Christopher Spicer provided the map illustrated below as Figure 1 with the description "My Property location to the WWTP:"

FIGURE 1

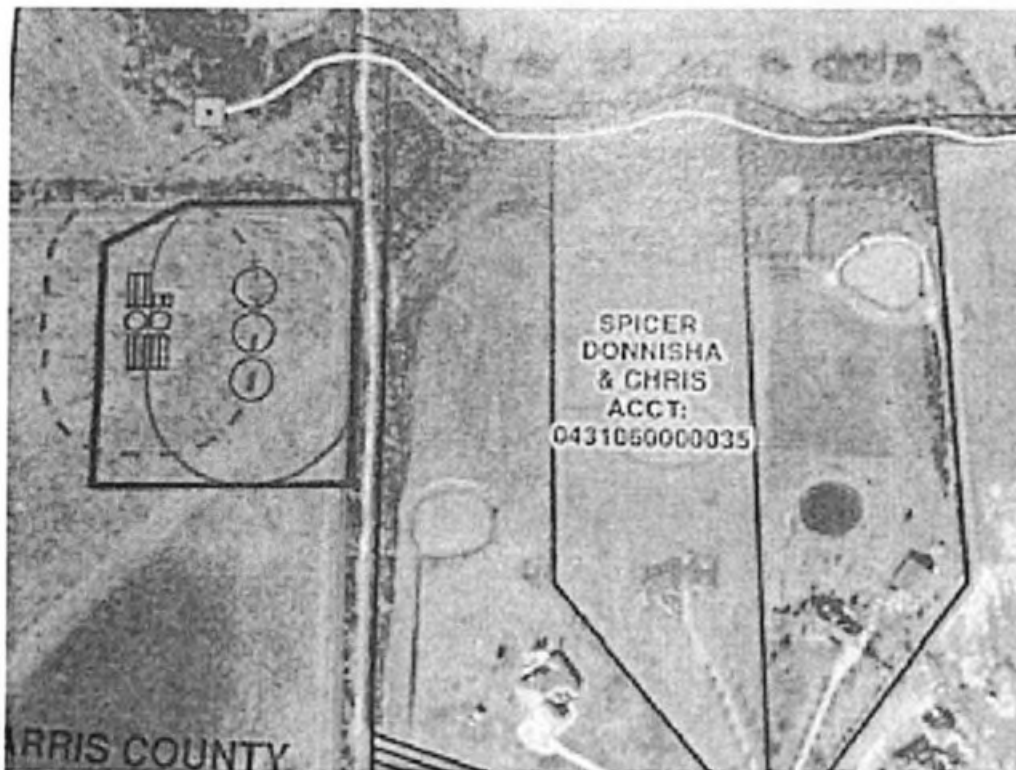


Figure 1 illustrates all three requestor's property locations along with a white line that appears to show the flow of South Mayde Creek from west to east beginning at the outfall of a WWTP that was proposed at the time the base map aerial image was created. Today,

there is an existing WWTP and outfall to South Mayde Creek at that location that is owned by Harris County MUD No. 495 and authorized by TPDES Permit No. WQ0015222002.

According to information on the Chief Clerk's Integrated Database, Harris County MUD No. 495 filed an application for a major amendment to Permit No. WQ0015222002 on November 8, 2022, which is currently under review by the ED. While HCMUD 171 takes no position on what effects, if any, the Harris County MUD No. 495 WWTP might have on the hearing requestors, it appears that the three requestors in this matter are all adjacent to and / or directly downstream from that WWTP. In contrast, all three hearing requestors are located a considerable distance from HCMUD 171's WWTP, none are adjacent to the WWTP property, and all have property on South Mayde Creek over a quarter of a mile upstream from the discharge route.

RESPONSE TO REQUEST FOR RECONSIDERATION

Texas Water Code Section 5.556 provides that a person may request that the Commission reconsider the ED's decision on a TPDES permit application. Rule 55.201 requires that requests for reconsideration of the ED's decision must meet the following requirements:

- (1) The request must be in writing and be filed by United States mail, facsimile, or hand delivery with the Chief Clerk within the time provided;
- (2) The request should contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; and
- (3) The request for reconsideration must expressly state that the person is requesting reconsideration of the ED's decision, and give reasons why the decision should be reconsidered.

Neither the Texas Water Code, nor any Commission Rule, provides a standard for determining when the Commission should grant a request for reconsideration.

No person filed a request for reconsideration as allowed under TCEQ Rule 55.201. Christopher and Donnisha Spicer's December 30, 2022 letter submitted electronically to the Chief

Clerk requests that the ED reconsider positions taken on issues identified in the Response to Comments. The request includes no reasons why the Commission should reconsider the ED's decision. As noted, Rule 55.201 allows for requests that the Commission reconsider the ED's decision. Because no person timely requested that the Commission reconsider the ED's decision, the Commission should not grant any request for reconsideration in this matter.

CONCLUSION

The Texas Water Code prohibits the Commission from granting the hearing requests filed on HCMUD 171's Application because those hearing requestors have not demonstrated any personal justiciable interest that will be affected by the Commission's granting of the Application. HCMUD 171 respectfully requests that the Commission deny all hearing requests and issue the requested major amendment to TPDES Permit No. WQ0015264001 consistent with the draft amendment prepared by the ED.

Respectfully submitted,

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HARRIS COUNTY MUD NO. 171**

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Harris County Municipal Utility District No. 171's Response to Requests for Contested Case Hearing and Requests for Reconsideration was served on the following on this 20th day of March, 2023.

FOR THE CHIEF CLERK (by email):

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Austin, Texas 78711-3087

Texas Commission on Environmental Quality
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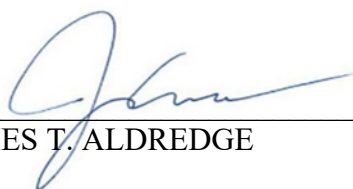
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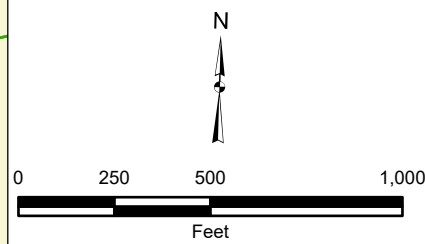
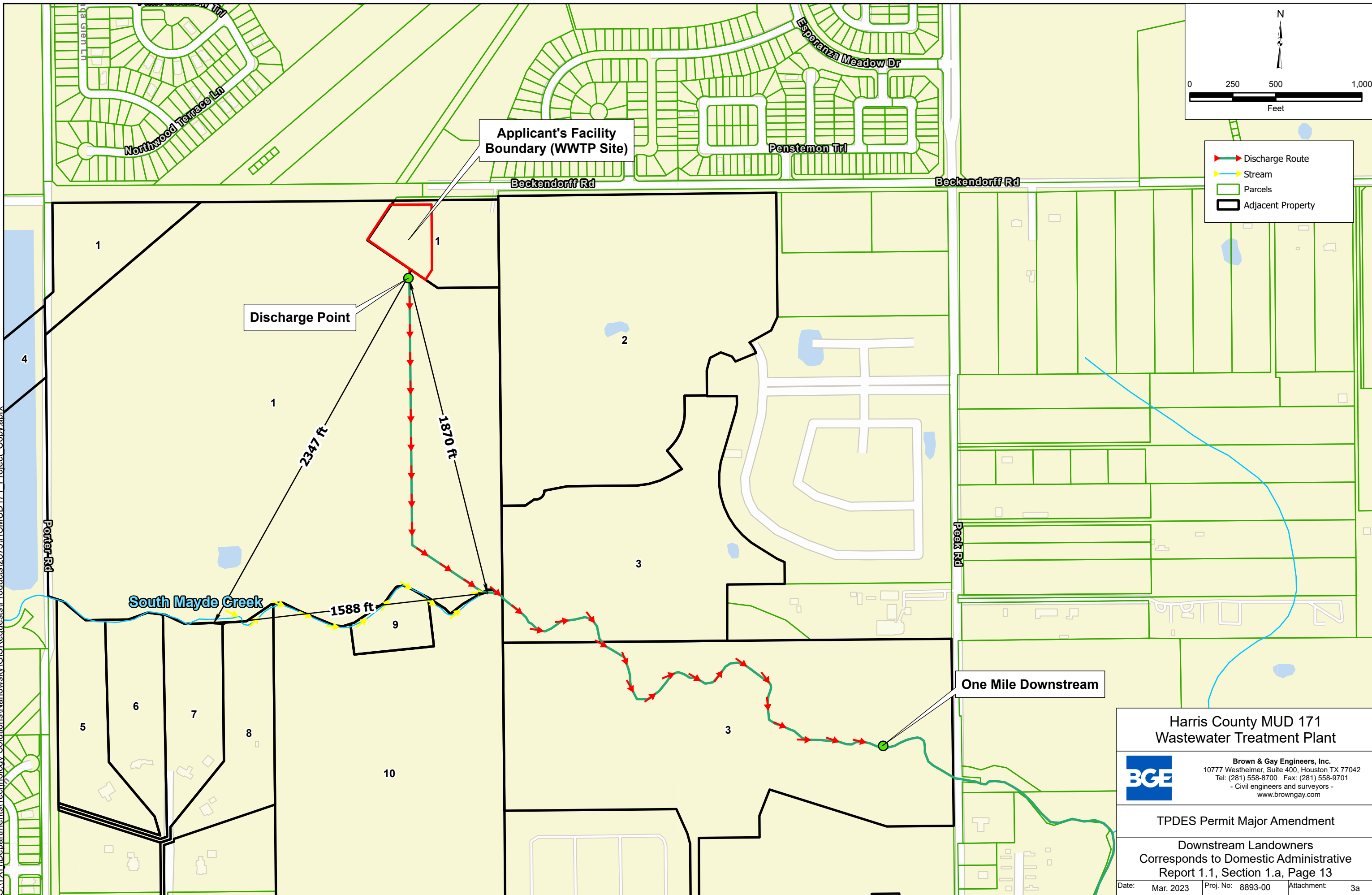
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- Discharge Route
- Stream
- Parcels
- Adjacent Property

Discharge Point

Applicant's Facility Boundary (WWTP Site)

One Mile Downstream

**Harris County MUD 171
Wastewater Treatment Plant**

BGE
Brown & Gay Engineers, Inc.
10777 Westheimer, Suite 400, Houston TX 77042
Tel: (281) 558-8700 Fax: (281) 558-9701
- Civil engineers and surveyors -
www.browngay.com

TPDES Permit Major Amendment

Downstream Landowners
Corresponds to Domestic Administrative
Report 1.1, Section 1.a, Page 13

Date: Mar. 2023 Proj. No: 8893-00 Attachment: 3a