

Jon Niermann, *Chairman*
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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 3, 2023

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

**RE: Application by SWWC Utilities Inc for Permit No. WQ0016022001;
TCEQ Docket No. 2023-0370-MWD**

Dear Ms. Gharis:

Enclosed for filing with the Texas Commission on Environmental Quality (Commission) is the Executive Director's Response to Hearing Requests.

Please do not hesitate to contact me at Anthony.Tatu@tceq.texas.gov or (512) 239-5778 if you have any questions. Thank you for your attention to this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Anthony Tatu".

Anthony Tatu, Staff Attorney
Environmental Law Division

Enclosure

Cc: Mailing List

TCEQ DOCKET NO. 2023-0370-MWD

**APPLICATION BY
SWWC UTILITIES INC.
FOR PERMIT NO.
WQ0016022001**

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**BEFORE THE TEXAS
COMMISSION
ON
ENVIRONMENTAL QUALITY**

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

I. Introduction

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this Response to Hearing Requests (Response) on the application of SWWC Utilities for new TPDES Permit No. WQ0016022001. The Office of the Chief Clerk (OCC) received 18 hearing requests filed by 3 individuals and one organization. Anne Brockenbrough, Marilyn Kelinske, and Jonathan Beall all filed individual hearing requests. In addition, they filed a hearing request on behalf of the Wilbarger Creek Conservation Alliance (WCCA).

Attached for Commission consideration is a Geographic Information Systems (GIS) map of requestors in the area of the facility (Attachment A). The Draft Permit, Technical Summary, Executive Director's Preliminary Decision, and the Executive Director's Response to Public Comment can be found in the Agenda backup materials filed for the Commission's consideration.

II. Description of the Facility

SWWC Utilities, Inc., submitted an application to the Texas Commission on Environmental Quality (TCEQ) for a new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016022001 to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 200,000 gallons per day (gpd) in the Interim I phase, a daily average flow not to exceed 500,000 gpd in the Interim II phase, and a daily average flow not to exceed 800,000 gpd in the Final phase.

The treated effluent will be discharged via pipe to Wilbarger Creek, thence to Colorado River above La Grange in Segment No. 1434 of the Colorado River Basin. The unclassified receiving water use is high aquatic life use for Wilbarger Creek. The designated uses for Segment No. 1434 are primary contact recreation, public water supply, and exceptional aquatic life use. The effluent limitations in the draft permit will maintain and protect the existing instream uses. The plant site will be located approximately 0.42 miles southwest of the intersection of Bella Parkway and Old Texas Highway 20, in Travis County, Texas 78653.

III. Procedural Background

The permit application was received on July 28, 2021 and declared administratively complete on September 17, 2021. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English on December 16, 2021, in the *Austin American Statesman* newspaper. The Notice of Application and Preliminary Decision (NAPD) was published in English on June 30, 2022, in the *Austin American Statesman* newspaper. The public comment period ended on August 1, 2022.

This application was filed on or after February 12, 2019; 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.

IV. 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. The Commission implemented HB 801 by adopting procedural rules in Title 30 of the Texas Administrative Code (30 TAC) chapters 39, 50, and 55. Senate Bill 709 revised the requirements for submitting public comment and the Commission's consideration of hearing requests. This application was declared administratively complete on September 17, 2021; therefore, it is subject to the procedural requirements adopted pursuant to HB 801 and SB 709.

A. Legal Authority to Respond to Hearing Requests

"The Executive Director, the public interest counsel, and applicant may submit written responses to [hearing] requests"¹

Responses to hearing requests must specifically address:

- (a) whether the requestor is an affected person;
- (b) whether issues raised in the hearing request are disputed;
- (c) whether the dispute involves questions of fact or law;
- (d) whether the issues were raised during the public comment period;
- (e) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal

¹ 30 TAC §55.209(d).

- letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;
- (f) whether the issues are relevant and material to the decision on the application; and
 - (g) a maximum expected duration for the contested case hearing.²

B. Hearing Request Requirements

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

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 requestor'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 Executive Director'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 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 by the requestor and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law; and
- (5) provide any other information specified in the public notice of application.⁴

² 30 TAC §55.209(e).

³ 30 TAC §55.201(c).

⁴ 30 TAC §55.201(d).

C. Requirement that Requestor be an Affected Person

In order to grant a contested case hearing, the commission must determine 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 general 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;
 - (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 requestor 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.⁵
- (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 executive director; and
 - (3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.⁶

⁵ 30 TAC § 55.203.

⁶ 30 TAC § 55.203.

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.”⁷ “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.”⁸

V. Analysis of the Requests

The Executive Director has analyzed the hearing requests to determine whether they comply with Commission rules, who 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 Individual Requestors Complied with 30 TAC §§ 55.201(c) and (d).

The Executive Director reviewed the factors found in 30 TAC §§ 55.201(c) and (d), and 55.205 for determining if an individual or group meets the requirements for a contested case hearing and recommends the Commission find that Marilyn Kelinske, Anne Brockenbrough, Jonathan Beall and WCCA are not affected persons.

1. Marilyn Kelinske

The Executive Director reviewed the factors found in 30 TAC §§ 55.201(c) and (d), and 55.203 for determining if a person is an affected person and recommends the Commission find that Marilyn Kelinske is not an affected person.

Ms. Kelinske submitted timely hearing requests in writing, provided the required contact information, and raised issues that are the basis of her hearing requests in her timely comments. Ms. Kelinske states that she owns property on 11561 Littig Road. According to the GIS map prepared by the TCEQ this property is approximately 2.8 miles downstream from the proposed outfall. Ms. Kelinske’s concerns are common to the general public, and she failed to prove that she has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application not common to members of the general public and is not an affected person. Based on the available information, the Executive Director recommends finding that Ms. Kelinske is not an affected person.

Ms. Kelinske raised Issues 1, 2, 3, and 4, in her requests.

⁷ 30 TAC § 50.115(b).

⁸ 30 TAC § 50.115(c).

2. Anne Brockenbrough

The Executive Director reviewed the factors found in 30 TAC §§ 55.201(c) and (d), and 55.203 for determining if a person is an affected person and recommends the Commission find that Anne Brockenbrough is not an affected person.

Ms. Brockenbrough submitted timely hearing requests in writing, provided the required contact information, and raised issues that are the basis of her hearing requests in her timely comments. Ms. Brockenbrough states that she owns and lives on a working ranch three miles downstream from the proposed facility, which is reflected in the attached GIS map. Ms. Brockenbrough's concerns are common to the general public, and she failed to prove that she has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application not common to members of the general public. Based on the available information, the Executive Director cannot recommend finding that Ms. Brockenbrough is an affected person.

3. Jonathan Beall

The Executive Director reviewed the factors found in 30 TAC §§ 55.201(c) and (d), and 55.203 for determining if a person is an affected person and recommends the Commission find that Jonathan Beall is not an affected person.

Mr. Beall submitted timely hearing requests in writing, provided the required contact information, and raised issues that are the basis of his hearing requests in timely comments. Mr. Beall states that he owns property 5 miles downstream from the proposed facility but does not provide an address for this property. Mr. Beall's mailing address is reflected on the attached GIS map. Mr. Beall's concerns are common to the general public, and he failed to prove that he has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application not common to members of the general public. Based on the available information, the Executive Director cannot recommend finding that Mr. Beall is an affected person.

4. Wilbarger Creek Conservation Alliance (WCCA)

The Executive Director reviewed the factors found in 30 TAC §§ 55.201(c) and (d), and 55.205 for determining if a group or organization is an affected person and recommends the Commission find that WCCA is not an affected person.

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).

30 TAC § 55.205(b) 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, WCCA failed to identify any member of the organization who had a justiciable interest that could be affected by this application.

WCCA submitted a timely hearing request in writing, provided the required contact information, and raised the issues that are the basis of their hearing request in their timely comments. According to the hearing request, the mission of the WCCA is to preserve and protect the water quality of Wilbarger Creek. WCCA identified Marilyn Kelinske, Anne Brockenbrough, and Jonathan Beall as members who own property downstream from the proposed site. The hearing request states their properties are almost 5 miles downstream, but the proposed discharge will affect all of them. The hearing request also raises the issue of cumulative impacts to Wilbarger Creek. Therefore, as WCCA failed to identify any members of the association who would otherwise have standing to request a hearing in their own right, the Executive Director has determined that WCCA has not met this requirement for associational standing and should not be considered an affected person.

WCCA raised Issues 1, 2, 3, and 4, in its requests.

B. Whether the Issues Raised May be Referred to SOAH for a Contested Case Hearing.

The Executive Director has identified issues of disputed questions of fact or mixed questions of law and fact, raised during the comment period, in requests for a contested case hearing, and relevant to the decision on the application that could be referred to SOAH if the commission determines that a requestor is an affected person. The issues discussed were raised during the public comment period and addressed in the RTC. None of the issues were withdrawn. All identified issues in this response are considered disputed, unless otherwise noted.

A. Referable Issues to SOAH for a Contested Case Hearing

Issue 1: Whether the draft is protective of aquatic life and terrestrial wildlife in and adjacent to Wilbarger Creek. (RTC no. 1 and no. 3) 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. The Executive Director recommends the Commission refer this issue to SOAH.

Issue 2: Whether the draft permit should require higher treatment standards to include the most protective and available techniques. (RTC no. 6) The issue involves a disputed question of fact, was raised during the comment period, was not withdrawn, and is relevant and material to the issuance of the draft permit. The Executive Director recommends the Commission refer this issue to SOAH.

Issue 3: Whether the cumulative impacts of the proposed discharge into Wilbarger Creek were properly modeled and evaluated. (RTC No. 4) The issue involves a disputed question of mixed fact and law, was raised during the comment period, was not withdrawn, and is relevant and material to the issuance of the draft permit. The Executive Director recommends the Commission refer this issue to SOAH.

Issue 4: Whether the permit application addresses potential malfunctions at the proposed facility. (RTC no. 7) The issue involves a disputed question of fact, was raised during the comment period, was not withdrawn, and is relevant and material to the issuance of the draft permit. The Executive Director recommends the Commission refer this issue to SOAH.

B. Issues that are not relevant or Material to the Commission's Consideration or that are Matters of Law or Policy.

Issue 1: Whether the proposed discharge will result in increased flooding and erosion in Wilbarger Creek. (RTC No. 2) The issue involves a disputed question of fact, was raised during the comment period and was not withdrawn. However, it is not relevant and material to the issuance of the draft permit as it is not something TCEQ reviews as part of the application process. Therefore, the Executive Director does not recommend the Commission refer this issue to SOAH.

VI. Contested Case Hearing Duration

If there is a contested case hearing on this application, the Executive Director recommends that the duration of the hearing be six months from the preliminary hearing to the presentation of a proposal for decision to the Commission.

VII. Executive Director's Recommendation

The Executive Director recommends the following actions by the Commission:

1. The Executive Director recommends the Commission deny the Requests for Hearing filed by Marilyn Kelinske, Anne Brockenbrough, Jonathan Beall and the Wilbarger Creek Conservation Alliance.
2. If referred to SOAH, that the duration of the hearing be six months from the preliminary hearing to the presentation of the 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 issues 1-4 listed above in part V of this response.

Respectfully submitted,

Texas Commission on Environmental Quality

Erin Chancellor
Interim Executive Director

Guy Henry, Acting Deputy Director
Environmental Law Division



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REPRESENTING THE EXECUTIVE DIRECTOR OF
THE TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY

VIII. CERTIFICATE OF SERVICE

I certify that on, April 3, 2023, the “Executive Director’s Response to Hearing Requests” on the application by SWWC Utilities TPDES Permit No. WQ0002659000 was filed with the TCEQ’s Office of the Chief Clerk, and a complete copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, inter-agency mail, electronic submittal, or by deposit in the U.S. Mail.



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SWWC Utilities, Inc.

TCEQ Docket No. 2023-0370-MWD; TPDES Permit No. WQ0016022001

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Manor, Texas 78653

Marilyn Kelinske
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Austin, Texas 78731

Attachment A

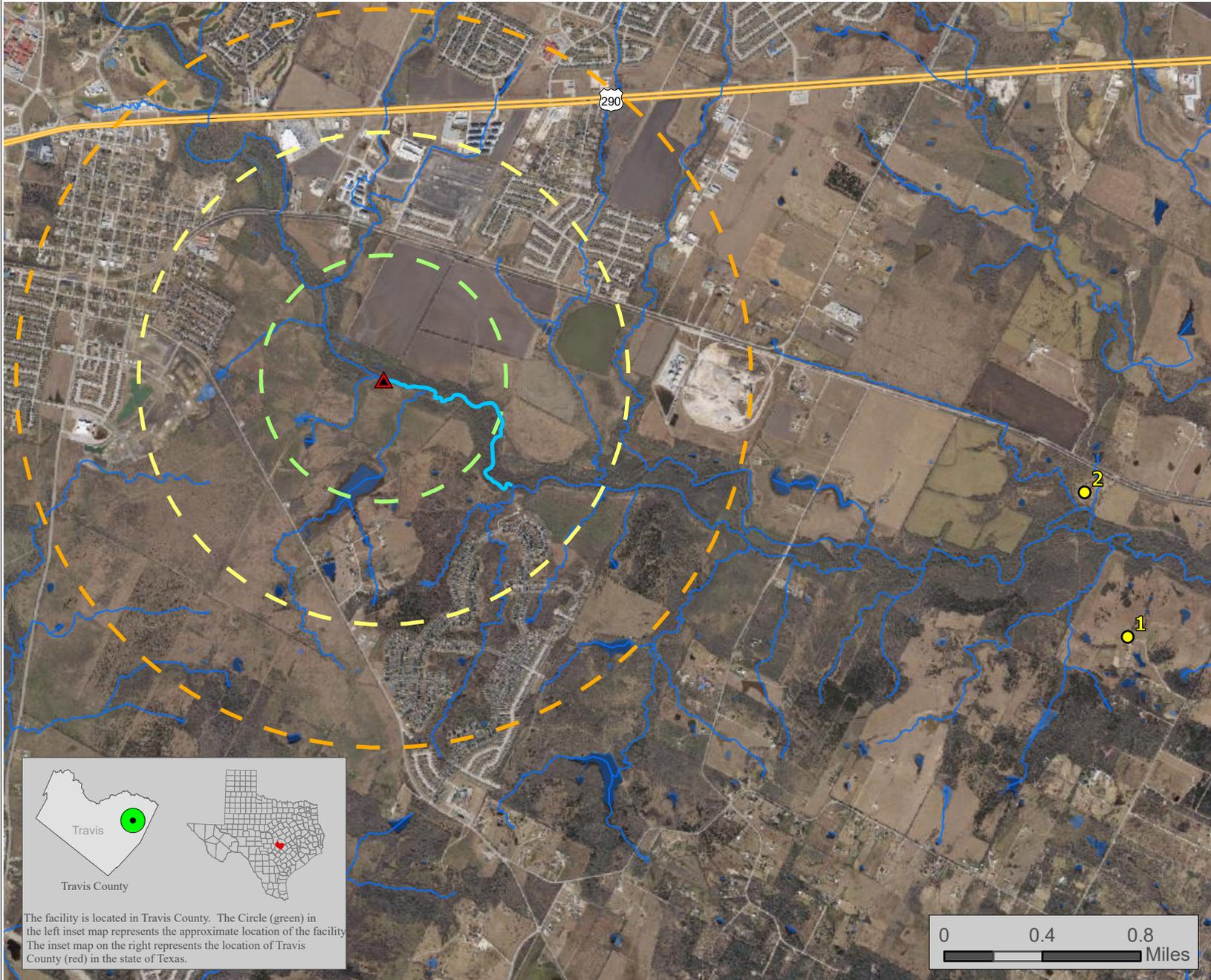
SWWC Utilities

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



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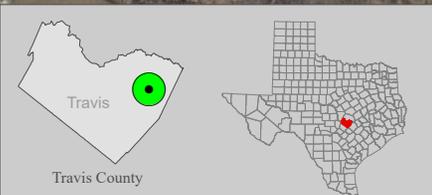
Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087
Date: 3/24/2023
CRF 0086257
Cartographer: cschrade



- Requestors
- Outfall
- 1 mi Discharge Route
- 0.5 mi Radius
- 1.0 mi Radius
- 1.5 mi Radius

Distances Between Requestors and Outfall:

- 1) Anne Stewart Brockenbrough - 3.21 mi
- 2) Marilyn Kelinske - 2.89 mi
- 3) Johnathan M Beall - 15.65 mi



The facility is located in Travis 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 Travis 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.

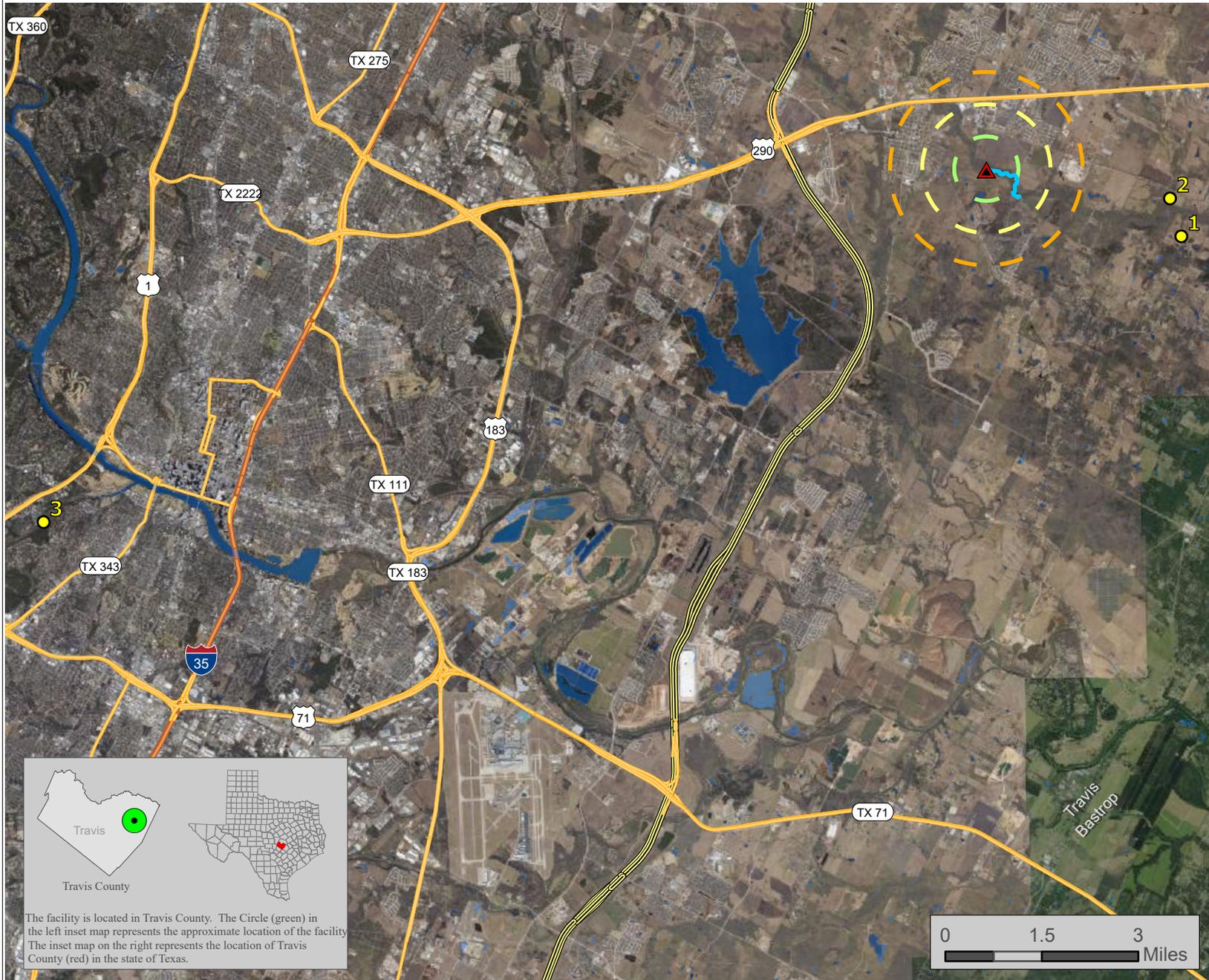
SWWC Utilities

Map Requested by TCEQ Office of Legal Services
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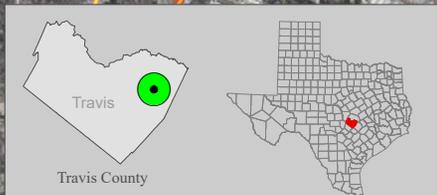
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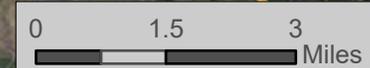
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