

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Erin E. Chancellor, *Interim Executive Director*



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 Kinder Morgan Petcoke Permit No. WQ0002659000;
TCEQ Docket No. 2023-0387-IWD**

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

Enclosure

Cc: Mailing List

TCEQ DOCKET NO. 2023-0387-IWD

APPLICATION BY	§	BEFORE THE TEXAS
KINDER MORGAN PETCOKE L.P.	§	COMMISSION
FOR PERMIT NO.	§	ON
WQ0002659000	§	ENVIRONMENTAL QUALITY

**EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS AND
REQUEST FOR RECONSIDERATION**

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 Kinder Morgan Petcoke, L.P. for a major amendment with renewal of TPDES Permit No. WQ0002659000. The Office of the Chief Clerk (OCC) received 12 identical hearing requests filed by six separate people on behalf of Bayou City Waterkeeper (BCWK), Public Citizen, and Healthy Port Communities Coalition (HPCC).

Attached for Commission consideration is a Geographic Information Systems (GIS) map of requestors in the area of the facility (Attachment A) along with the Applicant's list and map of landowners adjacent to the facility (Attachment B). 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

The Applicant, which operates Sims Bayou Petcoke Facility, a petroleum coke railcar handling facility, has applied for a major amendment with renewal of TPDES Permit No. WQ0002659000 to authorize the addition of process wastewater to Outfall 001. The draft permit authorizes the discharge of process wastewater and stormwater associated with industrial activity at a daily average flow at an intermittent and flow-variable rate via Outfall 001. The facility is located at 9847 Lawndale Street, in the City of Houston, Harris County, Texas 77017. The effluent is discharged via Outfall 001 directly to Sims Bayou Tidal in Segment No. 1007 of the San Jacinto River Basin. Under this permit action, process wastewater has been added to Outfall 001. The designated uses for Segment No. 1007 are navigation and industrial water supply.

III. Procedural Background

The application was received on November 3, 2021, and declared administratively complete on January 14, 2022. The Executive Director completed the technical review of the application on April 14, 2022, and prepared a draft permit.

The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in the *Houston Chronicle* on February 9, 2022, and the Notice of Application and Preliminary Decision (NAPD) in the *Houston Chronicle* on August 10, 2022. The public comment period for this application closed on September 9, 2022. This application was filed on or after November 4, 2021; therefore, this application is subject to the procedural requirements adopted pursuant to House Bill 801, 76th Legislature (1999) and Senate Bill 709, 84th Legislature, (2015), which are implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55.

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 January 14, 2022; 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 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

¹ 30 TAC §55.209(d).

² 30 TAC §55.209(e).

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

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.

³ 30 TAC §55.201(c).

⁴ 30 TAC §55.201(d).

- (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

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

⁵ 30 TAC § 55.203.

⁶ 30 TAC § 55.203.

⁷ 30 TAC § 50.115(b).

⁸ 30 TAC § 50.115(c).

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.

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 a group meets the requirements for a contested case hearing and recommends the Commission find that BCWK is not an affected person because the member they identify as someone who would otherwise have standing to request a hearing does not have a personal justiciable interest not common to members of the general public.

BCWK 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. BCWK identified Lisa Gray, who owns property at 5123 French Creek Drive in Houston, approximately 2.5 miles from the facility, as a member of the organization. The BCWK hearing request states that Ms. Gray is concerned that the permit application may affect her ability to enjoy her view of Berry Bayou and wildlife from her property. In addition, Ms. Gray uses Sims Bayou for recreational purposes (walking). Finally, Ms. Gray is concerned about her property interests (note that property interests was not a concern raised during public comment). Given Ms. Gray's distance from the facility and outfall, the Executive Director believes she is not a person who would otherwise have standing to request a contested case hearing. Ms. Gray has not established a personal justiciable interest in the application that is not common to members of the general public and is therefore not an affected person.

In their hearing request, BCWK raised specific concerns including the lack of a Stormwater Pollution Prevention Plan in the application, antidegradation concerns, compliance history concerns, and environmental justice concerns.

In their request, BCWK raised Issues 1, 2, and 3 of the issues the Executive Director recommends referring.

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 their request 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 permit application meets rule requirements when the permit does not include a SWPPP. (RTC no. 1) 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 permit application complies with TCEQ's antidegradation policy under 30 TAC Section 307.5. (RTC no. 2) 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 3: Whether the applicant has an adequate compliance history. (RTC 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.

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 application addresses environmental justice concerns. (RTC no.4) The issue involves a disputed question of fact, was raised during the comment period, and was not withdrawn. TCEQ is committed to protecting human health and the environment for all Texans throughout the state. When evaluating permits that would authorize landfill facilities, TCEQ considers the surrounding community without regard to its socioeconomic or racial status. TCEQ does not allow discrimination on the basis of race, color, national origin, sex, disability, age, sexual orientation, veteran status, or retaliation in the administration of our programs or activities, as required by federal and state laws and regulations. TCEQ strives to ensure that all Texans can participate in TCEQ programs. However, this issue 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 on behalf of BCWK.
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



Anthony Tatu , Staff Attorney
Environmental Law Division
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Phone (512) 239-5778

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 Kinder Morgan Petcoke, L.P. 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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Phone (512) 239-5778
Fax: (512) 239-0626

MAILING LIST
Kinder Morgan Petcoke, L.P.
TCEQ Docket No. 2023-0387-IWD; Permit No. WQ0002659000

FOR THE APPLICANT

Brad Miller, Vice President
Kinder Morgan Petcoke, L.P.
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Pasadena, Texas 77503

Bruce Daniel, P.E., Senior Engineer
TRC Environmental Corporation
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Houston, Texas 77079

FOR THE EXECUTIVE DIRECTOR
via electronic mail:

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FOR PUBLIC INTEREST COUNSEL
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FOR THE CHIEF CLERK
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REQUESTER(S) and INTERESTED PERSON(S)
see list next page

REQUESTERS

Kristen Schlemmer
Bayou City Waterkeeper
2010 North Loop West, Suite 103
Houston, Texas 77018

Adrian Shelley
Public Citizens Texas Office
309 East 11th Street, Suite 2
Austin, Texas 78701

Stefania Tomaskovic
The Healthy Port Communities Coalition
309 East 11th Street, Suite 2
Austin, Texas 78701

INTERESTED PERSON(S)

Lindsey T. Engelman
Environmental Integrity Project
1206 San Antonio Street
Austin, Texas 78701

Attachment A

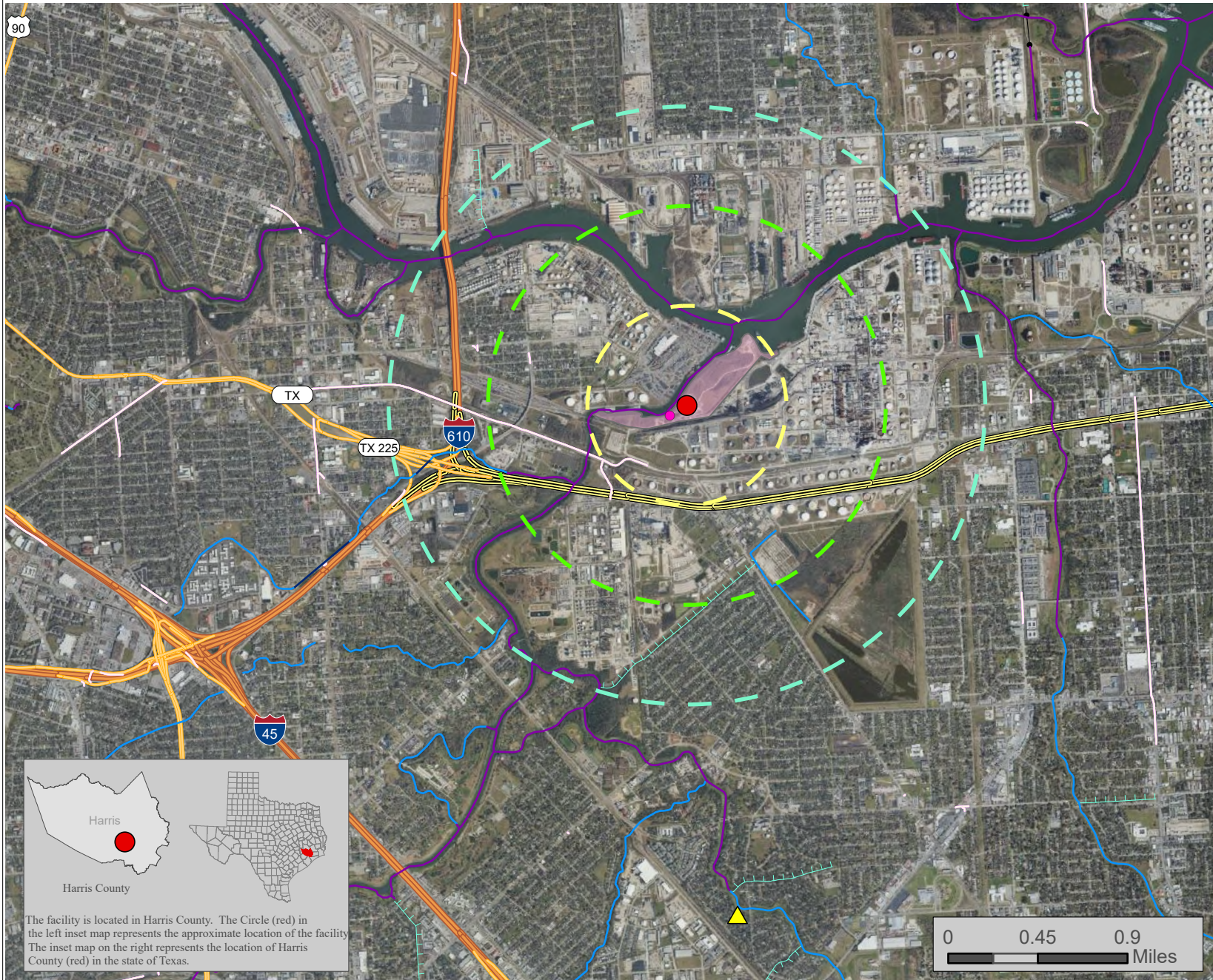
Kinder Morgan Petcoke L.P.

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: 3/23/2023
CRF 0086254
Cartographer: AlOrtiz



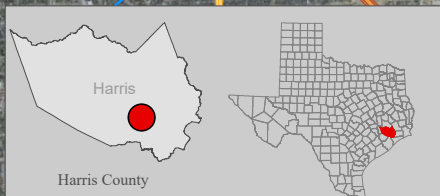
- Outfall 001
- Kinder Morgan Petcoke L.P.
- ▲ Requestor
- 0.5 Mile from Kinder Morgan Petcoke L.P.
- 1.0 Mile from Kinder Morgan Petcoke L.P.
- 1.5 Mile from Kinder Morgan Petcoke L.P.
- Connector
- Canal/Ditch
- Pipeline
- Stream/River
- Artificial Path
- Property Boundary

Distance from Requestor to
Outfall: 2.52 Miles

Distance from Requestor to
Kinder Morgan Petcoke L.P.: 2.47
Miles

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.

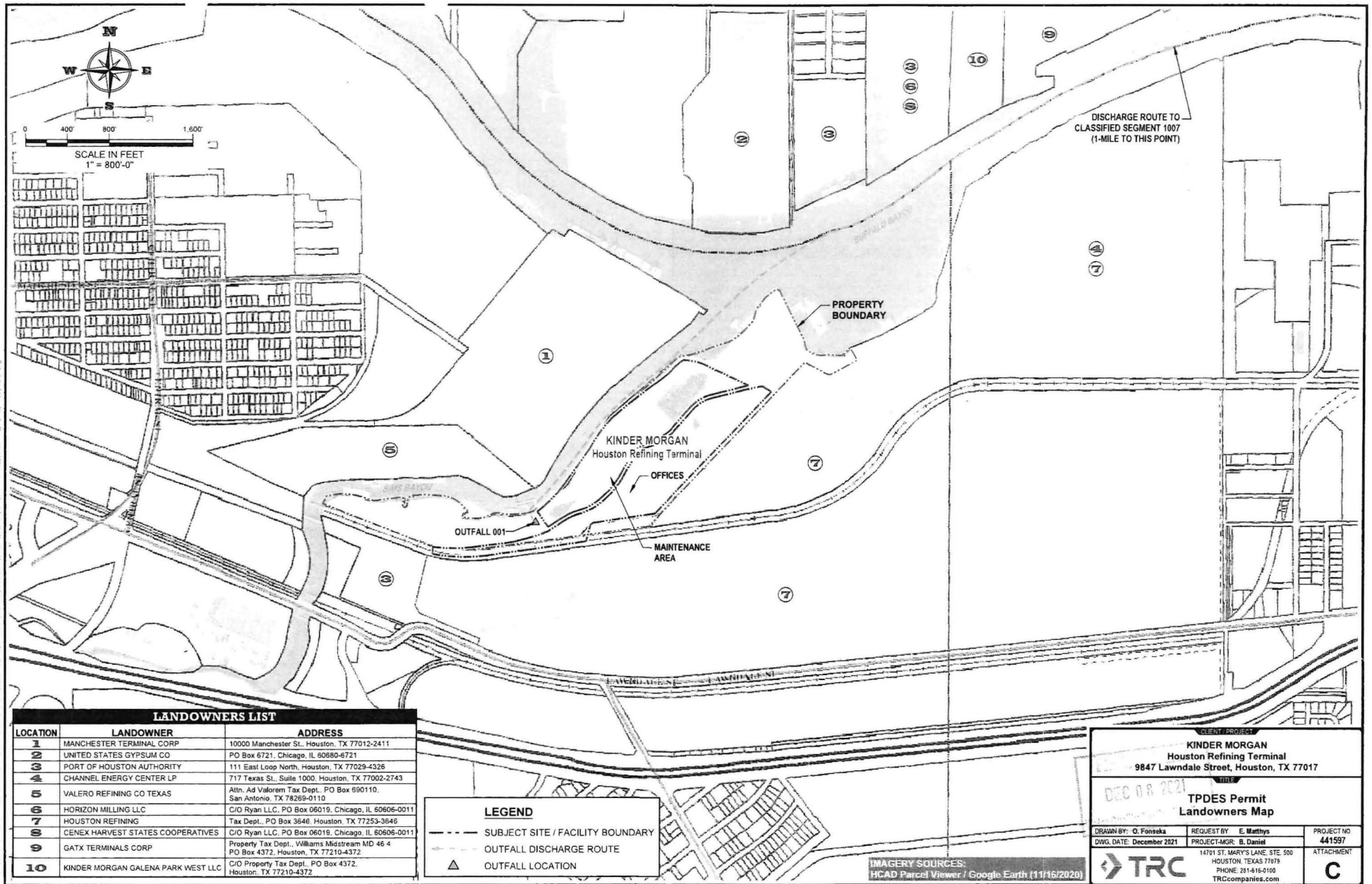
This map was generated by the Information Resources Division of the Texas Commission on Environmental Quality. This product is for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. It does not represent an on-the-ground survey and represents only the approximate relative location of property boundaries. For more information concerning this map, contact the Information Resource Division at (512) 239-0800.



The facility is located in Harris County. The Circle (red) 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.

0 0.45 0.9
Miles

Attachment B



LANDOWNERS LIST

LOCATION	LANDOWNER	ADDRESS
1	MANCHESTER TERMINAL CORP	10000 Manchester St., Houston, TX 77012-2411
2	UNITED STATES GYPSUM CO	PO Box 6721, Chicago, IL 60680-6721
3	PORT OF HOUSTON AUTHORITY	111 East Loop North, Houston, TX 77029-4326
4	CHANNEL ENERGY CENTER LP	717 Texas St., Suite 1000, Houston, TX 77002-2743
5	VALERO REFINING CO TEXAS	Attn: Ad Valorem Tax Dept., PO Box 690110, San Antonio, TX 78269-0110
6	HORIZON MILLING LLC	C/O Ryan LLC, PO Box 06019, Chicago, IL 60606-0011
7	HOUSTON REFINING	Tax Dept., PO Box 3646, Houston, TX 77253-3646
8	CENEX HARVEST STATES COOPERATIVES	C/O Ryan LLC, PO Box 06019, Chicago, IL 60606-0011
9	GATX TERMINALS CORP	Property Tax Dept., Williams Middleman MD 46 4, PO Box 4372, Houston, TX 77210-4372
10	KINDER MORGAN GALENA PARK WEST LLC	C/O Property Tax Dept., PO Box 4372, Houston, TX 77210-4372

LEGEND

- SUBJECT SITE / FACILITY BOUNDARY
- OUTFALL DISCHARGE ROUTE
- ▲ OUTFALL LOCATION

IMAGERY SOURCES:
HCAD Parcel Viewer / Google Earth (11/16/2020)

KINDER MORGAN
Houston Refining Terminal
9847 Lawndale Street, Houston, TX 77017

DEC 08 2021

TPDES Permit Landowners Map

DRAWN BY: O. Fonseca
DWG. DATE: December 2021

REQUEST BY: E. Matthys
PROJECT MGR: B. Daniel

PROJECT NO:
441537

14701 ST. MARY'S LANE, STE. 500
HOUSTON, TEXAS 77078
PHONE: 281-616-0100
TRCcompanies.com

TRC

ATTACHMENT:
C

Landowner List

Kinder Morgan Houston Refining Terminal

Houston	Landowner	Address
1	MANCHESTER TERMINAL CORP	10000 MANCHESTER ST HOUSTON, TX 77012-2411
2	UNITED STATES GYPSUM CO	PO BOX 6721 CHICAGO, IL 60680-6721
3	PORT OF HOUSTON AUTHORITY	111 EAST LOOP N HOUSTON, TX 77029-4326
4	CHANNEL ENERGY CENTER LP	717 TEXAS ST STE 1000 HOUSTON, TX 77002-2743
5	VALERO REFINING CO TEXAS	ATTN AD VALOREM TAX DEPT PO BOX 690110 SAN ANTONIO, TX 78269-0110
6	HORIZON MILLING LLC	C/O RYAN LLC PO BOX 06019 CHICAGO, IL 60606-0011
7	HOUSTON REFINING	TAX DEPT PO BOX 3646 HOUSTON, TX 77253-3646
8	CENEX HARVEST STATES COOPERATIVES	C/O RYAN LLC PO BOX 06019 CHICAGO, IL 60606-0011
9	GATX TERMINALS CORP	PROPERTY TAX DEPT WILLIAMS MIDSTREAM MD 46 4 PO BOX 4372 HOUSTON TX 77210-4372
10	KINDER MORGAN GALENA PARK WEST LLC	C/O PROPERTY TAX DEPT PO BOX 4372 HOUSTON, TX 77210-4372

DEC 08 2021