

TCEQ DOCKET NO. 2023-1593-MWD

APPLICATION BY THE
CITY OF MARBLE FALLS FOR
NEW TCEQ PERMIT NO.
WQ0016234001

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BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY

EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Hearing Requests on the application by the City of Marble Falls (Applicant) for new TCEQ Permit No. WQ0016234001 to authorize the construction of the Applicant's One Water Marble Falls Wastewater Treatment Facility and disposal site (proposed facility) for disposal of treated domestic wastewater at a daily average flow limit of 1.5, 2.0, 3.0, 4.0 million gallons per day via surface irrigation of 360 acres of non-public access, agricultural land in the Interim I, II, III, and Final phases (respectively). Will Fowler filed timely, written, requests for a Contested Case Hearing (Request(s)).

II. ATTACHMENTS FOR COMMISSION CONSIDERATION

A. Attachment A - ED's GIS Map

III. DESCRIPTION OF FACILITY & THE ED'S TECHNICAL REVIEW

A. FACILITY

When constructed the proposed facility will be an AGS treatment system plant with treatment units in the first three phases consisting of include one bar screen, four aeration basins, one final clarifier, one sludge digester, and one chlorine contact chamber. Treatment units in the Final phase will include two fine screens, a manual bar screen, two vortex grit removal systems, four AGS basins, two effluent filter units, a chlorine contact basin, two sludge buffer basins, and an aerated sludge storage tank.

In all phases of the proposed permit, the facility includes two storage ponds with a total surface area of 16 acres and total capacity of 220 acre-feet for storage of treated effluent prior to irrigation. The rate of wastewater application to the irrigated land must not exceed 4.74 acre-feet per year per acre irrigated. The irrigated crops include Bermuda during the spring and summer and rye grass in the fall and winter months.

The proposed facility will be located approximately 1.0 miles northwest of the intersection of FM 1431 and U.S. Highway 281, in Burnet County, Texas 78654, and will be within the drainage basin of Marble Falls Lake in Segment No. 1405 of the Colorado River Basin. However, no discharges of pollutants into water in the state is authorized by the proposed permit.

B. ED'S TECHNICAL REVIEW

The basis for the ED's Technical Review of a TPDES permit application comes from the Texas Legislature's passage of Chapter 26 (Water Quality Control) of the TWC into law, which gives the TCEQ primary authority over WQ in Texas. Chapter 26 combines the TCEQ's WQ authority with federally delegated CWA regulatory authority for the

TPDES program, which controls discharges of pollutants into Texas' surface waterbodies, otherwise defined by the TWC as "Water in the State." To implement TCEQ's WQ control program, Chapter 26 grants the TCEQ the authority to issue permits (and amendments) for the disposal of wastewater adjacent to Water in the State, so long as the parameters established through the ED's Technical Review of the application, comply with the TWC, TCEQ rules, and the TSWQS. However, the TCEQ may refuse to issue a permit when the ED's Technical Review finds that issuing the permit would violate the provisions of any state or federal law or rules or regulations derived from those laws, or when it finds that issuing the permit would interfere with the TCEQ's implementation of its WQ control program.

To ensure compliance with the TSWQS, WQD staff follow the prescribed methodology in the TCEQ's IPs for drafting a permit, its limits, requirements, and conditions. The limits for all phases of the proposed permit, based on a daily average, are 20 mg/l CBOD₅ and 20 mg/l TSS.

Through the Technical Review, the ED provides the proper limits to maintain and protect human health and the environment. For that reason, the ED has determined that the proposed permit, if issued, meets all statutory and regulatory requirements and is protective of the environment, WQ, and human health. Considering the TCEQ's WQ-primacy, all determinations, reviews, or analyses related to the ED's Technical Review of the application for the proposed permit can be reexamined and subsequently modified upon receipt of newer information or information that conflicts with the bases employed in the applicable review or analysis.

IV. PROCEDURAL HISTORY

The TCEQ received the application on October 3, 2022, and declared it administratively complete on November 8, 2022. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in Burnet County, Texas in *The Highlander* on November 15, 2022. The ED completed the technical review of the application on March 4, 2023, 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 Burnet County, Texas in *The Highlander* on May 19, 2023. The public comment period ended on June 20, 2023, the ED's Response to Comment was filed on August 29, 2023, and with the ED's Final Decision Letter, was mailed on September 6, 2023. The deadline for filing a Request or a Request for Reconsideration (RFR) was October 6, 2023. 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, and the procedural requirements and rules implementing Senate Bill 709, 84th Legislature, 2015, which are implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55.

V. ACCESS TO RULES, LAWS AND RECORDS

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, and the procedural requirements and rules implementing Senate Bill 709, 84th Legislature, 2015, which are implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55.

- All administrative rules: Secretary of State Website: www.sos.state.tx.us
- TCEQ rules: Title 30 of the Texas Administrative Code: www.sos.state.tx.us/tac/ (select TAC Viewer on the right, then Title 30 Environmental Quality)
- Texas statutes: www.statutes.capitol.texas.gov
- TCEQ website: www.tceq.texas.gov (for downloadable rules in WordPerfect or Adobe PDF formats, select “Rules, Policy, & Legislation,” then “Current TCEQ Rules,” then “Download TCEQ Rules”);
- Federal rules: Title 40 of the Code of Federal Regulations (C.F.R.)
http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title40/40tab_02.tpl
- Federal environmental laws: <http://www.epa.gov/lawsregs/>
- Environmental or citizen complaints may be filed electronically at:
<https://www.tceq.texas.gov/compliance/complaints/index.html> (select “use our online form”) or by sending an email to the following address:
complaint@TCEQ.texas.gov

Commission records for the proposed facility are available for viewing and copying at TCEQ’s primary office in Austin, 12100 Park 35 Circle, Building F, 1st Floor (Office of Chief Clerk, for the current application until final action is taken). Some documents located at the Office of the Chief Clerk may also be located in the TCEQ Commissioners’ Integrated Database at www.tceq.texas.gov/goto/cid.

Since publication of the NORI, the permit application was available for viewing and copying at Marble Falls City Hall, located at 800 3rd Street, Marble Falls, Texas, the ED verified the application and proposed permit, if issued, meets all statutory and regulatory requirements.

Since publication of the NAPD, ED’s preliminary decision, the final permit application, proposed permit, and statement of basis/technical summary of the ED’s Technical Review, was available for viewing and copying at the same location. The ED determined that the proposed permit is protective of the water quality and protective of human health and the environment.

However, if individuals wish to file a complaint about the proposed facility concerning its compliance with the provisions of its permit or with TCEQ rules, complaints may be filed electronically by using the methods described above at the seventh bullet under “Access to Rules, Laws, and Records.” If an inspection by the TCEQ finds that the Applicant is not complying with all requirements of the proposed permit, or that the proposed facility is out of compliance with TCEQ rules, enforcement actions may arise.¹

VI. 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

¹ For individuals wishing to file a complaint to address potential permit violations at the proposed facility concerning its compliance with the provisions of its permit or with TCEQ rules, the TCEQ’s Regional Office (Region 11) in Austin, Texas may be contacted at (512) 339-2929 or the statewide toll-free number at 1-888-777-3186.

administratively complete on September 14, 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 executive director, the public interest counsel, and applicant may submit written responses to [hearing] requests... [which 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.²

The issues described above in subparagraph A.6. are often referred to as “relevant and material fact issues.”

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.

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.³

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;

² 30 TAC §§ 55.209(d) and (e) [combined].

³ 30 TAC § 55.201(c).

(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.⁴

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;
 - (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.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 ED; and

⁴ *Id.* at § 55.201(d).

⁵ 30 TAC § 55.203(a)-(c).

- (3) any other expert reports, affidavits, opinions, or data submitted by the ED, 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 State Office of Administrative Hearing (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

E. REQUESTS FOR RECONSIDERATION

According to 30 TAC § 55.201(e), any person may file a RFR of the ED’s decision no later than 30 days after the Chief Clerk mails the ED’s decision and RTC, if it expressly states that the person is requesting reconsideration of the ED’s decision, is in writing, and gives reasons why the decision should be reconsidered.

VII. ANALYSIS OF THE HEARING REQUESTS

The ED analyzed whether the Requests followed TCEQ rules, the requestor’s Affected Person qualifications, what issues to refer for a possible hearing, and the appropriate length of any hearing. After reviewing the Requests with the following analysis, the ED respectfully recommends granting the Request of Will Fowler.

A. WHETHER THE REQUEST COMPLIED WITH 30 TAC §§ 55.201(C) AND (D).

1. **Will Fowler** filed timely, written Requests that provided the requisite contact information, raised relevant and material issues that form the basis of his Request in timely comments not withdrawn before the RTC was filed, and requested a hearing.

Mr. Fowler’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 Mr. Fowler believes he will be affected by the application differently than the public. Mr. Fowler’s Requests stated his family owns property that is adjacent to the location of the proposed facility on multiple sides and raised issues relevant to a decision on the application, such as dangers to human health and harm to the environment around the proposed facility.

The ED recommends finding that Will Fowler’s Requests substantially complied with 30 TAC §§ 55.201(c) and 55.201(d).

B. WHETHER REQUESTOR IS AN AFFECTED PERSON UNDER 30 TAC § 55.203.

1. **Will Fowler** filed Requests that effectively identified a personal, justiciable interest affected by the application.

⁶ *Id.* at § 55.203(d).

⁷ 30 TAC § 50.115(b).

⁸ *Id.* at § 55.203(d).

Mr. Fowler's Requests raised relevant and material fact issues because of proximity to the proposed facility. Mr. Fowler's Requests stated concerns about the proposed facility's dangers to human health and the environment. Mr. Fowler's Requests stated that the location of the proposed facility abuts his family's property on its northern and southern boundaries, which the GIS map prepared by the ED's staff verified. This affects the likelihood that Mr. Fowler's family's property may be affected in a way not common to the public.

Mr. Fowler's family's property's proximity that was explained in plain language, specifically and briefly in his Requests and the relevant issues to a decision on the application, like dangers to human health and the environment from the proposed facility raised in his requests and that are related to the interests of the requestor demonstrate that a reasonable relationship exists between the interests claimed and the activity regulated.

Because Mr. Fowler demonstrated a personal judiciable related to a legal interest not in common to the public, as required by Texas Water Code § 5.115, the ED recommends the Commission find that he is an affected person.

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

VIII. ISSUES RAISED IN THE HEARING REQUEST:

The ED's analysis of the issues raised in Mr. Fowler's Requests identified the following relevant and material fact issue of:

1. Whether the draft permit contains adequate protections for human health and the environment consistent with state law and TCEQ's rules.

(RTC Response Nos. 2 & 3) This is an issue of fact. If it can be shown that the draft permit does not have adequate protections for human health and the environment consistent with state law and the TCEQ's rules, 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.

IX. 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.

X. EXECUTIVE DIRECTOR'S RECOMMENDATION

The ED recommends the following actions by the Commission:

1. Find that Will Fowler is an affected person under 30 TAC §§ 55.203.
2. Grant the Requests of Will Fowler.
3. Should the Commission decide to refer this case to SOAH.
 - a. refer the case to Alternative Dispute Resolution for a reasonable time.
 - b. refer the identified issues in section VIII. 1. to SOAH for a Hearing.

Respectfully submitted,

Texas Commission on Environmental Quality

Kelly Keel, *Executive Director*

Erin Chancellor, *Director*
Office of Legal Services

Charmaine Backens, *Deputy Director*
Environmental Law Division



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REPRESENTING THE EXECUTIVE DIRECTOR
OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

XI. CERTIFICATE OF SERVICE

I certify that on January 12, 2024, the Executive Director's Response to Hearing Requests for TPDES Permit No. WQ0016234001 was filed with the Texas Commission on Environmental Quality's Office of the 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.



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

MAILING LIST
City of Marble Falls
TCEQ Docket No. 2023-1593-MWD Permit No. WQ0016234001

FOR THE APPLICANT:

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Marble Falls, Texas 78654

Christina McDonald, City Secretary
City of Marble Falls
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Marble Falls, Texas 78654

Ashley Lewis, Interim Water Quality/
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FOR THE CHIEF CLERK

via eFilings:

Docket Clerk
Texas Commission on Environmental
Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711
www.tceq.texas.gov/goto/efilings

REQUESTER(S):

Will Fowler, III
1208 McKeithen Drive
Alexandria, Louisiana 71303

Attachment A

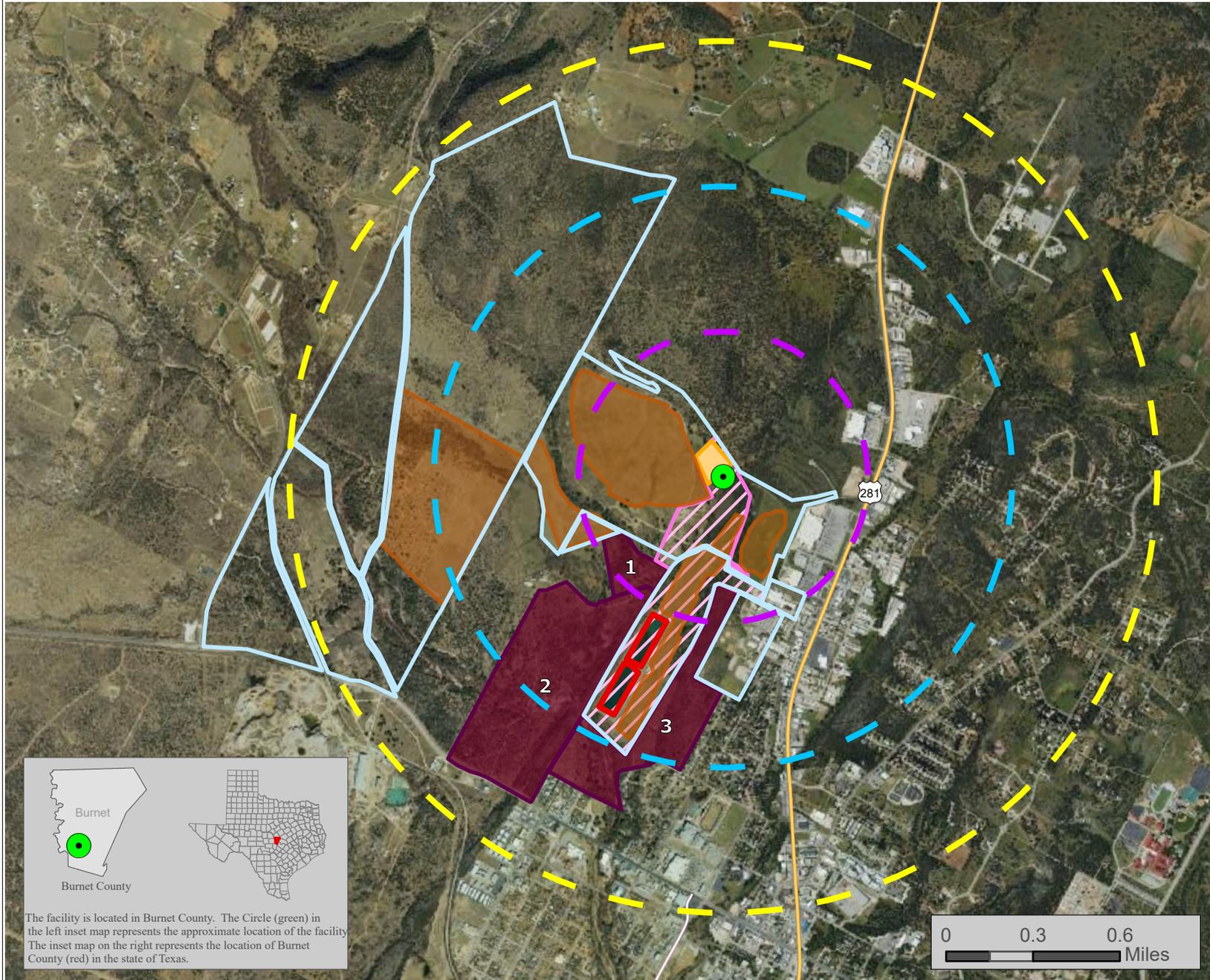
One Water Marble Falls - City of Marble Falls (North)



*Protecting Texas by
Reducing and
Preventing Pollution*

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

Texas Commission on Environmental Quality
GIS Team (Mail Code 197)
P.O. Box 13087
Austin, Texas 78711-3087
Date: 10/24/2023
CRF 0096114_activeaprx
Cartographer: Abanda

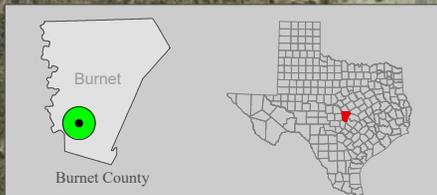


- Facility Treatment Plant Point
- 0.5-Mile Facility Treatment Plant Radius
- 1.0-Mile Facility Treatment Plant Radius
- 1.5-Mile Facility Treatment Plant Radius
- Burnet County Parcels
- Effluent Disposal Site
- Facility Treatment Boundary
- Effluent Storage Ponds
- City of Marble Falls Property Boundary
- Fowler Nancy Shifflett Trust
- County Boundary

The distance between the Facility Treatment Plant Point and Fowler Nancy Shifflett Trust Property are below in miles:
Property #1 - 0.37
Property #2 - 0.46
Property #3 - 0.37

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 Burnet 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 Burnet County (red) in the state of Texas.

