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Emily Lindley, *Commissioner*  
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Toby Baker, *Executive Director*



*Vic McWhorter, Public Interest Counsel*

## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

December 13, 2021

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

RE: **STEPHEN SELINGER**  
**TCEQ DOCKET NO. 2021-1442-MWD**

Dear Ms. Gharis:

Enclosed for filing is the Office of Public Interest Counsel's Response to Hearing Requests in the above-entitled matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Garrett Arthur", written in a cursive style.

Garrett Arthur  
OPIC Senior Attorney

cc: Mailing List



DOCKET 2021-1442-MWD

STEPHEN SELINGER	§	BEFORE THE
WAXAHACHIE 530 WWTP	§	TEXAS COMMISSION ON
TPDES PERMIT WQ0015932001	§	ENVIRONMENTAL QUALITY

OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO HEARING REQUESTS

**To the Members of the Texas Commission on Environmental Quality:**

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the hearing requests in the above-captioned matter.

**I. Summary of Position**

For the reasons stated herein, OPIC respectfully recommends the Commission grant the hearing requests from City of Ennis, City of Waxahachie, Ellis County, and Gregory Burdette and refer the specified relevant and material issues to the State Office of Administrative Hearings (SOAH) for a contested case hearing.

**II. Background**

On October 1, 2020, Stephen Selinger (Applicant) applied for Texas Pollutant Discharge Elimination System (TPDES) permit WQ0015932001 to authorize the proposed Waxahachie 530 wastewater treatment plant. The application was declared administratively complete on December 3, 2020. The proposed permit would authorize the discharge of treated domestic wastewater

at a daily average flow not to exceed 405,000 gallons per day. The facility would be located approximately 3,907 feet northwest of the intersection of Getzenander Road and the railroad tracks, and approximately 2,045 feet southeast of the end of Jenkins Road, in Ellis County. The treated effluent would be discharged to an unnamed tributary, then to Waxahachie Creek, and then to Bardwell Reservoir in Segment No. 0815 of the Trinity River Basin.

The first newspaper notice was published December 8, 2020 in *La Prensa Cominidad* and December 9, 2020 in the *Waxahachie Daily Light*. The second newspaper notice was published June 6, 2021 in the *Waxahachie Daily Light* and June 8, 2021 in *La Prensa Cominidad*. The public comment period closed July 8, 2021, and the Executive Director's (ED) Response to Comments (RTC) was mailed September 14, 2021. The deadline to request a hearing was October 14, 2021. Each of the following Requestors timely submitted comments and requested a hearing: City of Ennis, City of Waxahachie, Ellis County, Gregory Burdette, and State Representative Jake Ellzey.<sup>1</sup>

### **III. Applicable Law**

This application was filed on or after September 1, 2015, and is therefore subject to Senate Bill 709, Tex. S.B. 709, 84<sup>th</sup> Leg., R.S. (2015) (SB 709). For SB 709 applications, Texas Water Code Section 5.115(a)(a-1)(2)(B) provides the Commission may not find that a hearing requestor is an affected person unless

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<sup>1</sup> State House District 10 is currently represented by Brian Harrison. Former State Representative Jake Ellzey submitted his comments and hearing request prior to his election to Congress in July 2021.

the hearing requestor timely submitted comments on the application. Texas Government Code Section 2003.047(e-1) further provides that each issue referred by the Commission must have been raised by an affected person in a timely comment filed by that affected person. The Commission's Chapter 55 rules implement these statutory requirements and other provisions of SB 709.

Under Title 30, Texas Administrative Code (TAC) § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that 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;
- (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;
- (4) for applications filed 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, and list any disputed issues of law; and

- (5) provide any other information specified in the public notice of application.

Under 30 TAC § 55.203(a), 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. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors include:

- (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, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person;
- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Under § 55.203(d), to determine whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the ED; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the ED, the applicant, or hearing requestor.

For an application filed on or after September 1, 2015, § 55.211(c)(2)(A)(ii) provides that a hearing request made by an affected person shall be granted if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application.

Under § 55.211(c)(2)(B)-(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

#### **IV. Analysis of Hearing Requests**

##### **A. Whether the requestors are affected persons**

###### *City of Ennis*

The City of Ennis timely submitted comments within the comment period and timely requested a hearing. As stated by the City, Applicant's proposed plant and discharge would be located entirely within the City's extraterritorial jurisdiction (ETJ). Under 30 TAC § 55.203(b), a local government with authority under state law over issues raised by an application may be considered an

affected person, and the City states that under the Texas Local Government Code, it has authority to protect public health and safety and regulate development within its ETJ. The City also states that various city functions and services, including water, sewer, and emergency services, may be affected by the proposed discharge. Further, the City notes that Lake Bardwell is its sole source of drinking water, and the proposed upstream discharge could negatively impact the water quality in Lake Bardwell. Finally, as a regional water and sewer service provider, the City seeks to ensure that new development within its ETJ will regionalize with existing systems, as contemplated by the State's regionalization policy provided in Texas Water Code § 26.081.

By rule, if the City of Ennis has authority under state law over issues raised by the application, it may be considered an affected person,<sup>2</sup> and a factor to consider in that determination is the City's statutory authority over or interest in issues relevant to the application.<sup>3</sup> According to the City, the proposed plant and discharge are within its ETJ. Regarding the purpose of extraterritorial jurisdiction, Texas Local Government Code § 42.001 states, "The legislature declares it the policy of the state to designate certain areas as the extraterritorial jurisdiction of municipalities to promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities." The Texas Local Government Code also states in § 212.044 that a municipality may adopt general plans, rules, or ordinances governing

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<sup>2</sup> 30 TAC § 55.203(b).

<sup>3</sup> 30 TAC § 55.203(c).



development plats of land within the limits and in the extraterritorial jurisdiction of the municipality to promote the health, safety, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality.

Given Applicant's location in the City's ETJ and the City's statutory authority over and interest in issues relevant to the application, OPIC finds the City should have standing under 30 TAC § 55.203. Further, as a regional water and sewer service provider, whose drinking water supply could be impacted, the City is uniquely situated to have interests which are not common to the general public. For these reasons, OPIC finds that the City of Ennis qualifies as an affected person.

*City of Waxahachie*

The City of Waxahachie timely submitted comments within the comment period and timely requested a hearing. The City is concerned about the water quality of Lake Bardwell because the Lake is a source of drinking water for the City, and the proposed discharge is upstream of the Lake. By rule, if the City of Waxahachie has an interest in an issue relevant to the application, the City can qualify as an affected person.<sup>4</sup> The water quality in Lake Bardwell is certainly an issue relevant to this application. Further, as a municipality responsible for providing drinking water from Lake Bardwell, the City has a unique and distinguishable interest in the water quality of Lake Bardwell. In conclusion,

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<sup>4</sup> 30 TAC § 55.203(c).

OPIC finds that the City of Waxahachie has a justiciable interest in this matter, the interest is not common to the general public, and therefore, the City of Waxahachie qualifies as an affected person.

Ellis County

Ellis County timely submitted comments within the comment period and timely requested a hearing. The County asserts that it has authority over various functions that may be affected by the proposed wastewater treatment plant and associated discharge. Those functions include transportation, emergency services, and health and safety. The County states that potential contamination of surface water within the region may impact the County's ability to effectively provide emergency services, may impact health and safety by lowering water quality, and may negatively impact the County's infrastructure.

By rule, if Ellis County has an interest in an issue relevant to the application, the County can qualify as an affected person.<sup>5</sup> Potential surface water contamination is certainly an issue relevant to this application, and as a governmental entity responsible for emergency services and infrastructure, the County could experience economic and public health and safety impacts. In conclusion, OPIC finds that Ellis County has a justiciable interest in this matter, the interest is not common to the general public, and therefore, Ellis County qualifies as an affected person.

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<sup>5</sup> *Id.*

Gregory Burdette

Gregory Burdette timely submitted comments and requested a hearing. Applicant's landowner map and list show that Mr. Burdette owns property which is adjacent to the proposed plant and on the discharge route within one mile downstream. Mr. Burdette states that the proposed discharge route is already eroding and meandering into his tract. He is concerned that introducing an additional 400,000 gallons of effluent per day would create accelerated erosion. Given the proximity of his property to the plant site and discharge route, Mr. Burdette's concern about the functionality of the proposed discharge route gives him a personal justiciable interest in this matter which is not common to the general public. Also, his concern is an interest protected by the law under which this application will be considered, and a reasonable relationship exists between that interest and the regulation of a wastewater treatment plant. Finally, the location of his property increases the likelihood of impacts to health, safety, and use of property. Therefore, OPIC finds that Gregory Burdette qualifies as an affected person.

State Representative Jake Ellzey

In his capacity as State Representative of District 10, Jake Ellzey timely submitted comments and requested a hearing. At the time of submittal, Jake Ellzey was a member of the legislature who represented the area in which the facility would be located, and as such, could have requested a public meeting.<sup>6</sup>

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<sup>6</sup> See 30 TAC § 55.154(c)(2).

However, the law does not provide for a State Representative to have standing based solely in their capacity as a legislator, or to request a contested case hearing on behalf of constituents. Therefore, OPIC must conclude that former State Representative Jake Ellzey is not an affected person in this case.

**B. Which issues raised in the hearing requests are disputed**

The following issues are disputed and were raised by affected requestors.

The requestors who raised the issue are noted in parentheses.

- Whether granting the application would be consistent with the state policy regarding regionalization of wastewater systems. (City of Ennis, City of Waxahachie)
- Whether issuance of the permit could negatively affect drinking water supplies. (City of Ennis, City of Waxahachie)
- Whether issuance of the permit could negatively affect the water quality in Lake Bardwell. (City of Ennis, City of Waxahachie, Ellis County)
- Whether the permit adequately addresses the discharge of sulfate and total dissolved solids. (City of Waxahachie)
- Whether the proposed discharge route is properly characterized in the application, and, as an operational feature of the proposed facility, will function properly. (Gregory Burdette)

**C. Whether the dispute involves questions of fact or of law**

All of the issues involve questions of fact.

**D. Whether the issues were raised during the public comment period**

The issues listed above in Section IV.B were all raised during the public comment period.

**E. Whether the hearing requests are based on issues raised solely in public comments which have been withdrawn**

None of the hearing requests are based on issues raised solely in public comments which have been withdrawn.

**F. Whether the issues are relevant and material to the decision on the application**

Regionalization

It is state policy to encourage regionalization,<sup>7</sup> and TCEQ must consider regionalization when deciding whether to issue a discharge permit.<sup>8</sup> Regionalization is therefore relevant and material to the Commission's decision on this application.

Water Quality

The TCEQ is responsible for protection of water quality under Texas Water Code Chapter 26 and 30 TAC Chapters 307 and 309. These responsibilities include ensuring compliance with the Texas Surface Water Quality Standards. The purpose of these standards is to "maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and economic development of the state."<sup>9</sup> Also, "[a] permit must contain effluent limitations that protect existing uses and preclude degradation of

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<sup>7</sup> See TEX. WATER CODE § 26.081(a).

<sup>8</sup> See TEX. WATER CODE § 26.0282.

<sup>9</sup> 30 TAC § 307.1.

existing water quality.”<sup>10</sup> Additionally, surface waters must not be toxic to humans from ingestion, consumption of aquatic organisms, or contact with the skin.<sup>11</sup> Therefore, the issues concerning water quality are relevant and material to the Commission’s decision on this application and appropriate for referral to SOAH.

*Characterization and Functioning of the Proposed Discharge Route*

Proper functioning of a discharge route as an operational feature of a wastewater treatment plant may be addressed under 30 TAC § 309.12.

Therefore, this issue is relevant and material to the Commission’s decision on the application and is appropriate for referral to SOAH.

**G. Maximum expected duration for the contested case hearing**

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC

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<sup>10</sup> 30 TAC § 307.2(d)(5)(D).

<sup>11</sup> 30 TAC § 307.4(d).

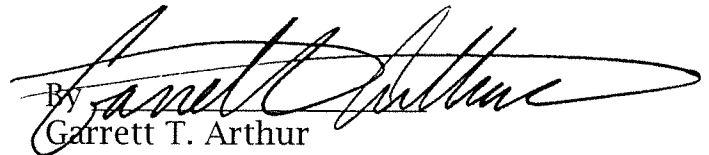
§ 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application should be 180 days from the first day of the preliminary hearing until the proposal for decision is issued.

## V. Conclusion

OPIC respectfully recommends the Commission find that City of Ennis, City of Waxahachie, Ellis County, and Gregory Burdette are affected persons and grant their hearing requests. OPIC further recommends the Commission refer the relevant and material issues listed in Section IV.B for a contested case hearing at SOAH with a maximum duration of 180 days. Finally, OPIC recommends the Commission deny the remaining hearing request.

Respectfully submitted,

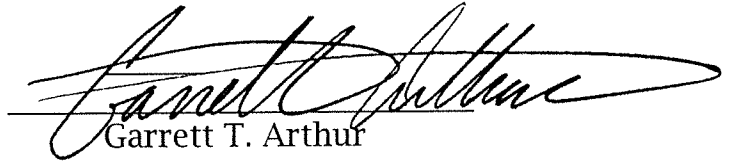
Vic McWherter  
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By  
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**CERTIFICATE OF SERVICE**

I hereby certify that on December 13, 2021, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, inter-agency mail, or by deposit in the U.S. Mail.

  
Garrett T. Arthur



**MAILING LIST  
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TCEQ DOCKET NO. 2021-1442-MWD**

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