

Jon Niermann, *Chairman*
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Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 17, 2023

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: IN THE MATTER OF THE APPLICATION BY STEEL DYNAMICS
SOUTHWEST, LLC FOR PERMIT NO. WQ0005283000
TCEQ DOCKET NO. 2023-0442-IWD**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0442-IWD

APPLICATION BY	§	BEFORE THE
STEEL DYNAMICS	§	
SOUTHWEST LLC	§	TEXAS COMMISSION ON
FOR MAJOR AMENDMENT OF	§	
TPDES PERMIT NO. WQ0005283000	§	ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE
TO REQUESTS FOR HEARING AND REQUESTS FOR RECONSIDERATION**

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 Requests for Hearing and Requests for Reconsideration in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Preliminarily, OPIC notes that the TCEQ Chief Clerk’s office received timely hearing requests from seven requestors. TCEQ also received multiple timely requests for reconsideration. As discussed herein, OPIC respectfully recommends granting the hearing requests of Janet Cumbie, Marlene Davis, Miriam Schubert, Rebecca Hartmann, Richard Gingrich, Jr., and Gary Schubert, and referring this application for a 180-day hearing at the State Office of Administrative Hearings (“SOAH”) on Issue nos. 1–4 contained in §III.B. OPIC further recommends the Commission deny the remaining hearing request and all pending requests for reconsideration.

B. Background of Facility

Steel Dynamics Southwest, LLC (“Applicant” or “Steel Dynamics”) applied to TCEQ for a major amendment to Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0005283000 to authorize removing the domestic sewage treatment facility; reducing the daily average flow from 1,560,000 gallons per day to 1,200,000 gallons per day; incorporating a

constructed wetland into the final effluent discharge pathway; relocating Outfall 001 and adding an internal outfall; and adding a second paint and galvanizing line to the plant. The draft permit authorizes the discharge of treated process wastewater, utility wastewater, and previously monitored effluent at a daily average flow not to exceed 1,200,000 gallons per day via Outfall 001; and industrial stormwater on an intermittent and flow-variable basis via Outfalls 002, 003, and 004.

Steel Dynamics operates the Sinton Mill, an iron and steel manufacturing and coil coating facility (the “Facility”), which is located at 8534 State Highway 89, near Sinton in San Patricio County. The primary discharge route from the plant site for Outfall 001 is via pipe to a constructed wetland, then through the constructed wetland to Outfall 001, then to Ditch 3, and then to Ditch 4. The alternate discharge route for Outfall 001 is via pipe to Outfall 001, then to Ditch 3, and then to Ditch 4. The discharge route for Outfall 002 is to Ditch 1, then to Ditch 4; and the route for Outfalls 003 and 004 are to Ditch 3, and then to Ditch 4. All outfalls then discharge to Chiltipin Creek, then to Chiltipin Creek Tidal, and then to Aransas River Tidal in Segment No. 2003 of the San Antonio-Nueces Coastal Basin. The unclassified receiving water uses are minimal aquatic life use for Ditches 1, 3, and 4; limited aquatic life use for Chiltipin Creek; and high aquatic life use for Chiltipin Creek Tidal. The designated uses for Segment No. 2003 are primary contact recreation and high aquatic life use.

The description of the treatment processes and effluent limitations contained in the draft permit and applicable to the Facility are voluminous, and OPIC will not restate them here. They

are described in the Executive Director's ("ED") Response to Public Comment ("RTC"), which is available for public viewing and download on TCEQ's website.¹

C. Procedural Background

TCEQ received the application on October 14, 2021. On December 9, 2021, the ED declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit ("NORI") was published on December 23, 2021 in the *News of San Patricio*. The ED completed the technical review of the application on July 29, 2022 and prepared the draft permit, which if approved, would establish the conditions under which the Facility must operate. The Notice of Application and Preliminary Decision was published on August 11, 2022 in the *News of San Patricio*. A public meeting was held on November 17, 2022, and the public comment period ended that same day at the close of the public meeting. The Chief Clerk mailed the ED's RTC on February 7, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the Executive Director's decision was March 9, 2023.

The Commission received requests for a contested case hearing from Janet Cumbie, Marlene Davis, Miriam Schubert, Rebecca Hartmann, Richard Gingrich, Jr., Gary Schubert, and Donna Rosson. The Commission also received requests for reconsideration of the ED's decision from Janet Cumbie, Marlene Davis, Miriam Schubert, Rebecca Hartmann, Richard Gingrich, Jr., and Gary Schubert.

¹ The ED's Response to Public Comment ("RTC") is accessible for public download by searching the TCEQ Commissioner's Integrated Database for Permit No. WQ0005283000 at the following link: <https://www14.tceq.texas.gov/epic/eCID/>.

II. APPLICABLE LAW

A. Requests for Hearing

This application was filed on or after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under Title 30, 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) 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.

30 TAC § 55.201(d).

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. Relevant factors to be considered in determining whether a person is affected 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 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;
- (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.

30 TAC § 55.203(c).

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 executive director; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

30 TAC § 55.203(d).

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission shall grant a hearing request made by an affected person 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.

B. Requests for Reconsideration

Any person may file a request for reconsideration of the ED's decision under Title 30, Texas Administrative Code ("TAC") § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED's decision and RTC. The request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.

III. HEARING REQUESTS

A. Determination of Affected Person Status

Janet Cumbie, Marlene Davis, Miriam Schubert, and Rebecca Hartmann

Janet Cumbie, Marlene Davis, Miriam Schubert, and Rebecca Hartmann jointly submitted a timely hearing request during the public comment period. The request explains that they are sisters who each have ownership interests in a parcel of property directly across from the Facility. They raise concerns about the Facility's effects on the water quality of Chiltipin Creek and their livestock who drink from the Creek. They also question whether the ED has properly considered

the existing uses of Chiltipin Creek. According to the map prepared by ED staff, their shared property is located along Chiltipin Creek and less than one mile from the discharge.

To be granted a contested case hearing, a requestor must show that they are an “affected person” who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application, and they must distinguish that interest from an interest common to the general public. *See* 30 TAC § 55.203(a).

Here, the requestors’ concerns about water quality and related impact to their livestock are interests that are protected by the law under which this application will be considered. 30 TAC § 55.203(c)(1). Further, as their property is near the Facility’s discharge, a reasonable relationship exists between their claimed interests and the Facility’s regulated activity. 30 TAC § 55.203(c)(3). Moreover, their location increases any likelihood that the Facility’s operations will impact their use of property. 30 TAC § 55.203(c)(4). Their proximity, in combination with their stated interests, demonstrates that they are likely to be affected in a way not common to members of the general public, and thus possess personal justiciable interests in this matter. Consequently, OPIC finds that Janet Cumbie, Marlene Davis, Miriam Schubert, and Rebecca Hartmann qualify as affected persons.

Richard Gingrich, Jr.

Richard Gingrich, Jr. submitted a timely hearing request on March 3, 2023. He explains that he lives on 572 acres of land adjacent to Chiltipin Creek and bordering the Sinton Mill. In his request, he states concerns that he previously raised in timely comment regarding Steel Dynamic’s past compliance with environmental laws; impacts to water quality, including stormwater runoff and groundwater quality; and impacts to human health, livestock, and animal life. He also states that the air permit issued to Steel Dynamic should be reviewed by the Commission. Mr. Gingrich

has articulated concerns which are protected by the law under which this application will be considered. While the ED's map does not show any property owned by Richard Gingrich, Jr., both the ED's map and the adjacent landowner map submitted as part of the application show a parcel of property owned by "RGRG JR LTD". This property is located less than one mile from the discharge and fits Mr. Gingrich's description. From this, OPIC is able to reasonably conclude that this is the property described, and owned, by Richard Gingrich, Jr.

Given that Mr. Gingrich's interests are protected by the law under which this application will be considered, and that his property is near the Facility's discharge, OPIC concludes that he is likely to be affected in a way not common to members of the general public. Further, a reasonable relationship exists between his concerns and the regulated activity. Therefore, OPIC finds that Richard Gingrich, Jr. has shown he qualifies as an affected person.

Gary Schubert

Gary Schubert submitted a timely hearing request during the public comment period. Mr. Schubert explains that he owns property on Chiltipin Creek and directly across from Sinton Mill. His request details concerns regarding impacts to water quality and livestock, sufficiency of the antidegradation review, and diminution in property value. These interests are protected by the law under which this application will be considered, and the ED's map shows Mr. Schubert's property is located less than a mile from the discharge. Further, a reasonable relationship exists between his concerns and the regulated activity. His concerns, combined with his location, demonstrate that he could be affected in a manner that differs from the general public. Therefore, OPIC finds that Gary Schubert has shown he qualifies as an affected person.

Donna Rosson

Donna Rosson submitted a timely hearing request during the public comment period. Her request includes concern for the Facility's impacts to water quality and wildlife. However, Ms. Rosson's location is not depicted on the ED's map, and it appears her residence is located approximately 15 miles from the Facility. OPIC notes that there are no specific distance limitations applicable to who may be considered an affected person for purposes of this application; however, considering the large intervening distance between Ms. Rosson and the Facility, OPIC cannot find that she qualifies as an affected person.

B. Issues Raised in the Hearing Requests of Affected Persons

The affected persons discussed above raised the following issues in both comment and request:

1. Whether the Facility and draft permit are adequately protective of water quality, including stormwater runoff and groundwater? (Raised by: Janet Cumbie, Marlene Davis, Miriam Schubert, Rebecca Hartmann, Richard Gingrich, Jr., and Gary Schubert)
2. Whether the Facility and draft permit are adequately protective of human health and animal life, including livestock? (Raised by: Janet Cumbie, Marlene Davis, Miriam Schubert, Rebecca Hartmann, Richard Gingrich, Jr., and Gary Schubert)
3. Whether the Executive Director's antidegradation review was adequate, including correct characterization of the existing uses of the receiving waters? (Raised by: Janet Cumbie, Marlene Davis, Miriam Schubert, Rebecca Hartmann, and Gary Schubert)
4. Whether the Executive Director adequately considered the Applicant's compliance history? (Raised by: Richard Gingrich, Jr.)
5. Whether any air quality authorizations issued to the Facility have been adequately reviewed in conjunction with this TPDES permit application? (Raised by: Richard Gingrich, Jr.)
6. Whether the Facility will negatively affect nearby property values? (Raised by: Gary Schubert)

C. Issues Raised in the Hearing Requests Remain Disputed

There is no agreement between the hearing requestors and the ED on the issues raised in the hearing requests. Thus, they remain disputed.

D. Whether the Disputed Issues Are Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A). The issues listed above are issues of fact.

E. Issues Were Raised by the Requestors During the Comment Period

Issue nos. 1–6 in Section III.B were raised by the affected persons during the public comment period.

F. The Hearing Requests are Based on Issues Raised in Public Comments Which Have Not Been Withdrawn

The hearing requests are all based on timely comments that have not been withdrawn.

G. Issues That are Relevant and Material to the Decision on the Application

The affected persons raise issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A), as well as issues that are not relevant and material. To refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law of the permit at issue. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

Water Quality, Human Health, and Animal Life

Requestors are concerned about adverse effects to water quality, human health, and animal life, including livestock. The Commission is responsible for the protection of water quality under

Texas Water Code (“TWC”) Chapter 26 and 30 TAC Chapters 307 and 309. The Texas Surface Water Quality Standards (“Standards”) in Chapter 307 require that the proposed permit “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.” 30 TAC § 307.1. According to § 307.6(b)(4) of the Standards, “[w]ater in the state must be maintained to preclude adverse toxic effects on aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three.” Additionally, “[s]urface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life.” 30 TAC § 307.4(d). As Chapter 307 and these Standards designate criteria for the protection of terrestrial life, including both humans and animal life, Issue nos. 1 and 2 are relevant and material to the Commission’s decision regarding this application and are appropriate for referral to SOAH.

Antidegradation Review

Requestors are concerned that a complete and sufficient antidegradation review was not performed and that the existing uses of the receiving waters were not correctly characterized. Antidegradation reviews are governed by 30 TAC § 307.5, which establishes the Commission’s antidegradation policy and contains provisions for implementation of the policy. As part of the ED’s antidegradation review, the existing uses of a waterbody are determined, and the draft permit is designed to protect those uses. Therefore, Issue no. 3 is relevant and material to the Commission’s decision regarding this application and is appropriate for referral to SOAH.

Compliance History

Requestors are concerned that Applicant's compliance with environmental laws, including laws of other states, has not been properly evaluated by the ED. Pursuant to 30 TAC § 60.1(a)(1)(A), TCEQ is required to utilize an applicant's compliance history when making decisions regarding an amendment of a permit. *Also see* TWC § 5.754(e). Further, the Commission is required to utilize compliance history for five years prior to the date the permit application is received by the ED, and specific components must be included in this history. 30 TAC § 60.1(b), (c). These components include orders, judgments, consent decrees, and criminal convictions relating to an entity's violation of EPA rules, which may include matters arising outside of Texas. *See* 30 TAC § 60.1(c)(1). Therefore, Issue no. 4 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Air Quality Authorizations and Property Values

Requestors also state that any air quality authorizations for the site should be reviewed by the Commission and are concerned about the Facility's effect on their property values. This application is for an amendment to a TPDES permit, which authorizes the discharge of effluent to water in the state, and review of the site's air quality authorizations is beyond the scope of this permitting process. Additionally, the Texas Legislature, which establishes the jurisdiction of TCEQ, has not given the Commission the authority to consider issues related to effects on property values when deciding whether to issue a TPDES permit. Therefore, Issue nos. 5 and 6 are not relevant and material to the Commission's decision regarding this Application and are not appropriate for referral to SOAH.

H. Issues Recommended for Referral

For the reasons discussed above, OPIC recommends referring Issue nos. 1–4 in Section III.B to SOAH for a contested case hearing.

I. Maximum Expected Duration of 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. 30 TAC § 50.115(d)(2). 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 § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. REQUEST FOR RECONSIDERATION

Janet Cumbie, Marlene Davis, Miriam Schubert, and Rebecca Hartmann

Janet Cumbie, Marlene Davis, Miriam Schubert, and Rebecca Hartmann jointly submitted a timely request for reconsideration of the ED's decision. They requested reconsideration of the application and ensuing draft permit because the draft permit fails to comply with the Texas Surface Water Quality Standards, specifically as they are applied to livestock and wildlife.

Their concern is relevant and material to the Commission's decision on this application, but an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the ED's decision should be reconsidered. At this time, an evidentiary

record does not exist, and therefore, OPIC cannot recommend that this request for reconsideration be granted. However, as discussed above, OPIC is recommending a contested case hearing in this matter and is recommending that this issue be referred for a hearing.

Richard Gingrich, Jr.

Richard Gingrich, Jr. submitted a timely request for reconsideration of the ED's decision. He requested reconsideration on the basis that the ED did not adequately consider impacts to water quality, including stormwater runoff and groundwater quality, and resultant impacts to human health, livestock, and animal life. He further requests reconsideration on the basis that the ED did not consider Steel Dynamic's environmental compliance record in other states. He also states that Steel Dynamic's air quality permit should be reviewed.

Mr. Gingrich's concerns, excepting his concern about air quality authorizations, are relevant and material to the Commission's decision on this application. However, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the ED's decision should be reconsidered. At this time, an evidentiary record does not exist, and therefore, OPIC cannot recommend granting this request for reconsideration. However, as previously discussed, OPIC is recommending a contested case hearing in this matter and is recommending that issues which encompass Mr. Gingrich's concerns be referred for hearing.

Gary Schubert

Gary Schubert submitted a timely request for reconsideration of the ED's decision stating that the affidavits utilized by TCEQ are deficient in some unspecified respect and could be deemed "void ab initio." Mr. Schubert suggests that TCEQ should create a template to ensure that affidavits meet substantive standards. He also requests reconsideration on the basis that the draft permit fails to comply with the Texas Surface Water Quality Standard as applied to livestock, and the toxicity

testing performed in connection with this application was deficient. Mr. Schubert additionally argues that the term “existing use” contained in the TCEQ notices for this application is deceptive.

Mr. Schubert’s water quality concerns are relevant and material to the Commission’s decision on this application. However, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the ED’s decision should be reconsidered. At this time, an evidentiary record does not exist, and therefore, OPIC cannot recommend that the request for reconsideration be granted. OPIC is recommending a contested case hearing in this matter and that this issue be referred for hearing.

Regarding affidavits, OPIC appreciates Mr. Schubert calling his concern to the Commission’s attention. However, he does not identify any specific deficiency in the affidavits submitted in connection with this application, and instead criticizes the format of TCEQ affidavits generally. OPIC has not identified any specific deficiencies with respect to this application’s affidavits, and a general complaint about TCEQ affidavits falls outside the scope of, and cannot be addressed in, this proceeding.

Finally, Mr. Schubert complains that the term “existing use” has been used deceptively by TCEQ. However, the term is defined by rule at 30 TAC § 307.3(a)(27) as “[a] use that is currently being supported by a specific water body or that was attained on or after November 28, 1975.” OPIC finds that TCEQ used the term consistent with this definition, and thus the ED’s decision should not be reconsidered on this basis.

In sum, OPIC cannot recommend granting Mr. Schubert’s request for reconsideration. However, OPIC is recommending a contested case hearing in this matter and is further recommending that the Commission find Mr. Gingrich to be an affected person and refer the issue of water quality for contested case hearing.

V. CONCLUSION

OPIC respectfully recommends that the Commission grant the hearing requests of Janet Cumbie, Marlene Davis, Miriam Schubert, Rebecca Hartmann, Richard Gingrich, Jr., and Gary Schubert and refer Issue nos. 1–4 specified in Section III.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 and all pending requests for reconsideration.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: 

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CERTIFICATE OF SERVICE

I hereby certify that April 17, 2023, the original of the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.



Sheldon P. Wayne

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TCEQ DOCKET NO. 2023-0442-IWD

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REQUESTER(S):

See attached list.

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