

**TCEQ DOCKET NO. 2023-0571-MWD**

<b>APPLICATION BY</b>	§	<b>BEFORE THE TEXAS COMMISSION</b>
<b>EPITOME DEVELOPMENT LLC</b>	§	
<b>FOR NEW WASTEWATER</b>	§	<b>ON</b>
<b>TPDES PERMIT</b>	§	
<b>NO. WQ0016226001</b>	§	<b>ENVIRONMENTAL QUALITY</b>

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**EPITOME DEVELOPMENT LLC’S RESPONSE  
TO REQUESTS FOR CONTESTED CASE HEARING**

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TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Applicant Epitome Development LLC (“Epitome” or “Applicant”) files this Response to Requests for Contested Case Hearing (“Response”), and in support thereof, would respectfully show the following:

**I. Introduction**

Epitome has applied to the Texas Commission on Environmental Quality (“TCEQ” or “Commission”) for Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0016226001 (the “Permit”), which will authorize the construction and operation of a new wastewater treatment plant (the “Facility”) for the management of domestic wastewater from a residential subdivision located approximately two miles south of the City of Taylor in Williamson County, Texas. At build out, there will be 795 residential connections, 350 apartment units, and 20 commercial connections. Under the terms of the draft permit issued by the Executive Director (“ED”) of the TCEQ (the “Draft Permit”), the Facility would be authorized to discharge treated effluent at an Interim volume not to exceed a daily average flow of 0.10 million gallons per day (“MGD”) and a Final volume not to exceed a daily average flow of 0.30 MGD. The treated

discharge from the Facility would be to an unnamed tributary, thence to an unnamed impoundment, thence to an unnamed tributary, thence to Battleground Creek, thence to Soil Conservation Service Site 31 Reservoir, thence to Battleground Creek, thence to Brushy Creek in Segment No. 1244 of the Brazos River Basin. The unclassified receiving water use is limited aquatic life use for unnamed tributary, unnamed impoundment, and Battleground Creek. The designated uses for Segment No. 1244 are primary contact recreation, public water supply, aquifer protection, and high aquatic life use.

## **II. Procedural History**

Epitome's September 27, 2022, permit application (the "Application") was declared administratively complete on October 4, 2022. On October 6, 2022, Epitome published Notice of Receipt and Intent to Obtain Water Quality Permit ("NORI") in English in the *Austin American-Statesman* and in Spanish in *El Mundo Newspaper*. The Executive Director's preliminary decision that the Permit, if issued, would meet all statutory and regulatory requirements, was issued on December 16, 2022, along with the Draft Permit. Epitome published Notice of Application and Preliminary Decision ("NAPD") in English in the *Austin American-Statesman* on December 20, 2022, and in Spanish in *El Mundo Newspaper* on December 22, 2022. The public comment period ended on January 23, 2023, with comments received from Patricia Daffin and Mr. Nathan E. Vassar on behalf of 05 Ranch Investments, Prairie Crossing Municipal Utility Districts 1 & 2, and Prairie Crossing Wastewater, LLC ("Prairie Crossing"<sup>1</sup>). The Executive Director issued the Response to Public Comment ("RTC") on March 16, 2023, fully responding

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<sup>1</sup> Given that the comments and hearings requests of 05 Ranch Investments, Prairie Crossing Municipal Utility Districts 1 & 2, and Prairie Crossing Wastewater, LLC are nearly identical, we refer to these entities collectively as "Prairie Crossing" throughout this Response. Where the requests differ, we refer to the relevant individual entity.

to Ms. Daffin’s and Prairie Crossing’s public comments and rendered their final decision on March 22, 2023, that the Application met the requirements of applicable law.

Requests for contested case hearing were submitted on January 20, 2023, and April 21, 2023, by Prairie Crossing and Patricia Daffin, respectively. On June 28, 2023, the TCEQ Chief Clerk announced that all timely filed hearing requests and requests for reconsideration will be considered by the Commissioners on August 2, 2023. Epitome hereby provides its response in accordance with Commission rules.

### **III. Prairie Crossing’s Request for a Contested Case Hearing Should Be Denied**

Prairie Crossing’s request for contested case hearing is legally deficient, and thus, should be denied, for two reasons: (1) Epitome sufficiently complied with the state’s regionalization policy, and was not required to contact Prairie Crossing in doing so; and (2) for all issues, including regionalization, raised by Prairie Crossing’s request, Prairie Crossing fails to meet the requirements for affected person status, and thus cannot be granted a contested case hearing.

#### ***a. Epitome Sufficiently Complied with the State’s Regionalization Policy***

##### ***1. Legal Standard for Regionalization***

Under the Texas Water Code, the Texas Legislature “finds and declares that it is necessary to the health, safety, and welfare of the people of this state to implement the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state.”<sup>2</sup> This policy, as demonstrated through the Domestic Technical Report required to be completed with every

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<sup>2</sup> TEX. WATER CODE § 26.081(a).

domestic TPDES application, is limited to facilities within three miles of an applicant’s proposed facility.<sup>3</sup>

A regionalization analysis requires the applicant to complete three tasks as part of a TPDES application:

- (1) “Determine whether or not there are any permitted domestic wastewater treatment facilities or collection systems within a three-mile radius of the proposed facility.
- (2) Contact any existing permitted domestic wastewater treatment facilities within a three-mile radius to inquire if they currently have the capacity to accept or are willing to expand to accept the volume of wastewater proposed.
  - If an existing facility does have the capacity to accept the proposed wastewater, submit an analysis of expenditures required to connect to the existing facility or collection system versus the cost of constructing and operating the proposed new facility or expansion.
- (3) Provide copies of all correspondence with the owners and/or operators of any existing permitted domestic wastewater treatment facilities and collection systems within a three-mile radius of the proposed facility.”<sup>4</sup>

TCEQ, in implementing this policy, states that “[t]he presence of a wastewater treatment facility or wastewater collection system within three miles of a proposed new wastewater treatment facility . . . is not an automatic basis to deny an application or to compel an applicant to connect to an existing facility.”<sup>5</sup> Further, TCEQ may approve a new application if any of the following scenarios are satisfied:

- “There is no wastewater treatment facility or collection system within three miles of the proposed facility.
- The applicant requested service from wastewater treatment facilities within the 3 miles, and the request was denied.
- The applicant can successfully demonstrate that an exception to regionalization should be granted based on costs, affordable rates, and/or other relevant factors.

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<sup>3</sup> Tex. Comm’n on Env’tl Qual., *Domestic Wastewater Permit Application*, last updated June 1, 2017, available at [https://www.tceq.texas.gov/permitting/wastewater/municipal/WQ\\_Domestic\\_Wastewater\\_Permits\\_Steps.html](https://www.tceq.texas.gov/permitting/wastewater/municipal/WQ_Domestic_Wastewater_Permits_Steps.html) (asking TPDES permit applicants if there are “any domestic permitted wastewater treatment facilities or collection systems located within a three-mile radius of the proposed facility”).

<sup>4</sup> Tex. Comm’n on Env’tl Qual., *TCEQ Regionalization Policy for Wastewater Treatment*, last updated Aug. 24, 2022, <https://www.tceq.texas.gov/permitting/wastewater/tceq-regionalization-for-wastewater>.

<sup>5</sup> *Id.* (emphasis TCEQ’s).

- The applicant has obtained a Certificate of Convenience and Necessity (CCN) for the service area of the proposed new facility or the proposed expansion of the existing facility.”<sup>6</sup>

In making these determinations, TCEQ looks to *existing* facilities within three miles of the applicant’s facility.<sup>7</sup> Put another way, nearby facilities that may be permitted, but are not constructed or operational are speculative and need not be considered by an applicant in accordance with the state’s regionalization policy.<sup>8</sup>

## 2. *Epitome Satisfied the Regionalization Requirements*

Epitome satisfactorily completed a regionalization analysis in compliance with the State’s regionalization policy. In completing the Application, Epitome completed each of the three TCEQ regionalization requirements included in TCEQ’s policy.

First, Epitome determined “whether or not there are any permitted domestic wastewater treatment facilities or collection systems within a three-mile radius” of the Facility. Epitome determined the answer to this inquiry was “yes.”<sup>9</sup> This “yes” was in reference to the permitted, but non-existent, facility belonging to Prairie Crossing Wastewater, LLC with TPDES Permit No. WQ0015850001 (the “Prairie Crossing Facility”).<sup>10</sup>

Second, Epitome marked “yes” to the inquiry of whether “a permitted domestic wastewater treatment facility or a collection system located within three (3) miles of the proposed

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<sup>6</sup> *Id.*

<sup>7</sup> See *Application of J.H. Uptmore and Associates for a New Wastewater Permit No. 14037-001*, 2001 WL 36084377 at \*2 (“Should the Commission deny the permit application and require the Applicant to obtain wastewater services for its proposed Harvest Hill subdivision from an *existing* provider? The Administrative Law Judge recommends the Commission not require the Applicant to obtain its wastewater service by utilizing an *existing* wastewater service provided.”) (emphasis added).

<sup>8</sup> See *Application of the City of Aledo for TPDES Permit No. WQ0010847001*, 2008 WL 3540048, at \*9 (Administrative Law Judge finding that applicant complied with TCEQ’s regionalization policy where “no regional or area-wide systems are available for the [applicant’s] use” because none had been built and thus “that possibility will not be available to the [applicant] for some years”).

<sup>9</sup> See Application at 39.

<sup>10</sup> Affidavit of Eric Vann, Attachment A.

facility currently have the capacity to accept or is willing to expand to accept the volume of wastewater proposed in this application.” This second “yes,” while demonstrative of Epitome’s efforts to support the regionalization policy of the state of Texas, is above and beyond what is required of the Application. This second inquiry, and the resulting requirement to contact nearby facilities, is only triggered by *existing* facilities.<sup>11</sup> Prairie Crossing, according to its own comments and request for a contested case hearing, agrees with Epitome on this point. According to Prairie Crossing, the TPDES application regionalization inquiries “concern[] the *existence* of permitted domestic wastewater treatment plants.”<sup>12</sup> Prairie Crossing, at one point in its comments, attempts to requalify the “existing” requirement to be an existing permittee, rather than an existing facility.<sup>13</sup> This is not only illogical (each inquiry is about the ability to regionalize with a *facility*, not with a permittee), but Prairie Crossing immediately reverts back to the appropriate interpretation when it states that “[t]he applicant must provide a justification for the proposed facility and a comparison of the costs to construct it against those to connect to the applicable *existing* facility.”<sup>14</sup>

The Prairie Crossing Facility does not exist.<sup>15</sup> At the exact location provided by Prairie Crossing in its Application (and the location reflected in the corresponding TPDES permit) for the Prairie Crossing Facility there is no facility currently operating.<sup>16</sup> At this location, there is no facility at all.<sup>17</sup> At this location, there is no construction or development of any such facility.<sup>18</sup>

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<sup>11</sup> See Tex. Comm’n on Env’tl Qual., *TCEQ Regionalization Policy for Wastewater Treatment*, last updated Aug. 24, 2022, <https://www.tceq.texas.gov/permitting/wastewater/tceq-regionalization-for-wastewater>; *Application of J.H. Uptmore and Associates for a New Wastewater Permit No. 14037-001*, 2001 WL 36084377 at \*2; *Application of the City of Aledo for TPDES Permit No. WQ0010847001*, 2008 WL 3540048, at \*9.

<sup>12</sup> Prairie Crossing Wastewater, LLC, *Public Comments, Request for Public Meeting, and Hearing Request Application for Proposed TPDES Permit No. WQ0016226001*, at 3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See generally, Affidavit of Ashley Lewis, Attachment B, Exhibit 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

In fact, there is also no residential or commercial construction or developments in the area surrounding the proposed Prairie Crossing Facility location.<sup>19</sup> The Prairie Crossing Facility, at this point in time, is purely speculative.

Nonetheless, and under no requirement to do so, Epitome contacted Matthew Tiemann, General Manager of Prairie Crossing via email on April 4, 2022, to determine if “an existing facility does have the capacity to accept the proposed wastewater.”<sup>20</sup> Despite Epitome’s efforts, to date, Epitome has not received a response sufficient to ensure that Prairie Crossing has the capacity and ability to support the wastewater needs of Epitome.<sup>21</sup> Prairie Crossing has failed to give Epitome the information necessary to determine the technical feasibility of regionalization, to determine consistency of construction schedules, to determine the costs associated with regionalization, or to determine if Prairie Crossing has any additional conditions for receiving wastewater service.<sup>22</sup> Without this information, Epitome could not engage in a regionalization analysis with Prairie Crossing, even if it were required to do so.<sup>23</sup>

Third, Epitome “[p]rovide[d] copies of all correspondence with the owners and/or operators of any existing permitted domestic wastewater treatment facilities and collection systems within a three-mile radius of the proposed facility.” While again, this requirement only applies to *existing* permitted facilities within three miles, Epitome went beyond the minimum requirement

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<sup>19</sup> *Id.*

<sup>20</sup> Affidavit of Eric Vann, Attachment A; Application at 110. On the same date, Epitome contacted Mark Daurity, Wastewater Treatment Plant Supervisor of the City of Taylor plant, which is more than three miles away from Epitome’s proposed Facility location. The City of Taylor has not requested a contested case hearing, and moreover, never responded to any communications from Epitome. Affidavit of Eric Vann, Attachment A.

<sup>21</sup> Affidavit of Eric Vann, Attachment A. Prairie Crossing claims its ability to provide the needed wastewater service is furthered by its own Amendment to expand its capacity, submitted on January 6, 2023. This Amendment application was submitted roughly nine months after Epitome conducted its regionalization analysis (and approximately three months after Epitome submitted its Application to TCEQ), and thus has no bearing on the sufficiency of such analysis.

<sup>22</sup> Affidavit of Eric Vann, Attachment A.

<sup>23</sup> *Id.*

and provided communications with the City of Taylor (beyond the three-mile radius) and with Prairie Crossing (not existing).<sup>24</sup>

In sum, Epitome complied with the state’s regionalization policy. Epitome not only followed the inquiries specified by TCEQ but went beyond these requirements in an effort to coordinate with two facilities, neither of which met the thresholds for necessitating a full regionalization analysis in the first place.

***b. Prairie Crossing Fails to Meet the Requirement for Affected Person Status***

***1. Legal Standard for Affected Person Status***

Under Section 55.201(c) of the TCEQ’s rules, a valid request for a contested case hearing must be (1) made by an affected person; (2) be timely filed; and (3) be based solely on the requestor’s timely comments.<sup>25</sup> Each of these three prongs is a mandatory requirement, and the request must fail if there is a failure in meeting any one of them.

Compliance with TCEQ’s rules is essential, because the Texas Legislature, in enacting the Texas Water Code, only allows an “affected person” the opportunity to demand that a hearing be held on permit applications.<sup>26</sup> Additionally, the Texas Legislature has narrowly defined the universe of “affected persons” who may validly demand that a contested case hearing be held by or on behalf of the Commission. Only those persons who have “a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing” may be granted a hearing.<sup>27</sup> “An interest common to members of the general public does not qualify as a personal justiciable interest.”<sup>28</sup>

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<sup>24</sup> See generally, Application, Attachment M; Affidavit of Eric Vann, Attachment A.

<sup>25</sup> 30 TEX. ADMIN. CODE § 55.201(c).

<sup>26</sup> See TEX. WATER CODE §§ 5.556(c); 5.115.

<sup>27</sup> TEX. WATER CODE § 5.115(a); see also 30 TEX. ADMIN. CODE § 55.203(a).

<sup>28</sup> TEX. WATER CODE § 5.115(a); 30 TEX. ADMIN. CODE § 55.203(a).

Moreover, the TCEQ adopted rules specifying the factors that must be considered in determining whether a person is an affected person. Those factors are:

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.<sup>29</sup>

The Commission may also consider information and analyses in the record in determining whether a person is an affected person, including:

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.<sup>30</sup>

In considering evidence to apply the above factors to a given request, the Third Court of Appeals explained that “TCEQ enjoys the discretion to weigh and resolve matters that may go to the merits of the underlying application, including the likely impact the regulated activity . . . will have on

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<sup>29</sup> 30 TEX. ADMIN. CODE § 55.203(c).

<sup>30</sup> 30 TEX. ADMIN. CODE § 55.203(d).

the health, safety, and use of property by the hearing requestor and on the use of natural resources.”<sup>31</sup> TCEQ’s application of the factors described above “may include reference to the permit application, attached expert reports, the analysis and opinions of professionals on its staff, and any reports, opinions, and data it has before it.”<sup>32</sup> In making these determinations, the court was applying the Texas Supreme Court’s 2013 decision in *Texas Commission on Environmental Quality v. City of Waco*, which affirmed TCEQ’s discretion to rely on such information in making an affected person determination.<sup>33</sup>

Lastly, a request must include the address of the requesters, a “written statement explaining in plain language the requester’s location and distance relative to the proposed facility” and explain “how and why the requester 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.”<sup>34</sup>

## 2. *Prairie Crossing is Not an Affected Person*

As a threshold issue, each of the three hearing requests submitted by Prairie Crossing are facially deficient. The requests submitted by 05 Ranch Investments, Prairie Crossing Municipal Utility Districts 1 & 2, and Prairie Crossing Wastewater, LLC, all fail to provide an address of the requester, or a plain-language explanation of the requester’s location and distance relative to the Facility’s proposed location.<sup>35</sup> For this reason alone, the requests should be denied. Regardless, even using the Prairie Crossing Facility location (the only location identified in each of the requests) does not garner Prairie Crossing affected person status.

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<sup>31</sup> *Sierra Club v. Tex. Comm’n on Env’tl. Quality*, 455 S.W.3d 214, 223–24 (Tex. App.—Austin 2014, pet. denied).

<sup>32</sup> *See id.* at 224.

<sup>33</sup> *See Tex. Comm’n on Env’tl. Quality v. City of Waco*, 413 S.W.3d 409, 420–21 (Tex. 2013).

<sup>34</sup> 30 TEX. ADMIN. CODE § 55.201(d)(1)–(2).

<sup>35</sup> *See id.*

Prairie Crossing fails to meet the requirements for affected persons status because its declared interests are common to members of the general public and cannot be the basis for affected person status. The comments on which Prairie Crossing bases its hearing request on can be categorized into three buckets: water quality issues,<sup>36</sup> regionalization,<sup>37</sup> and nuisance odors.<sup>38</sup>

Distance of the requester from the proposed facility is a relevant consideration in determining whether a requester has a personal justiciable interest unique from that of the general public.<sup>39</sup> The Commission has evaluated proximity in numerous cases based on TCEQ's experience in determining whether a requester is impacted in a manner not common to the general public.<sup>40</sup> Further, the Texas Court of Appeals has upheld TCEQ decisions finding no affected person status when the requesters lived more than 3 miles<sup>41</sup> and 1.3 miles<sup>42</sup> away from proposed facilities.

*a. Water Quality Issues*

Other than its permitted (and non-existent) facility, Prairie Crossing makes no mention of any facility or property it (or its manager, Matthew Tiemann) owns that could be affected by this Application. The Prairie Crossing Facility location is 1.4 miles away from Epitome's proposed Facility when measured as a straight line.<sup>43</sup> The water quality issues claimed

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<sup>36</sup> This bucket includes Prairie Crossing's comments that "The Application fails to sufficiently demonstrate need for the final phase;" "The Application raises concerns that the proposed discharge will not be in compliance with the TCEQ's antidegradation policy;" and "The Application contains a number of additional deficiencies" (not including "Buffer Zone" and "Nuisance Odors").

<sup>37</sup> This bucket includes Prairie Crossing's comment that "The Application fails to comply with the State's Regionalization Policy."

<sup>38</sup> The bucket includes Prairie Crossing's comment that "The Application contains a number of additional deficiencies" (only including "Buffer Zone" and "Nuisance Odors").

<sup>39</sup> 30 TEX. ADMIN. CODE § 55.201(d)(2); *see also* *Sierra Club v. Tex. Comm'n on Env'tl. Quality*, 455 S.W.3d 214, 224 (Tex. App.—Austin 2014, pet. denied).

<sup>40</sup> *See, e.g.*, An Order Concerning the Application by Southwestern Electric Power Company for Renewal and Amendment to TPDES Permit No. WQ0002496000, TCEQ Docket No. 2011-2199-IWD (Dec. 10, 2012).

<sup>41</sup> *Sierra Club v. Tex. Comm'n on Env'tl. Quality*, 455 S.W.3d 214, 224 (Tex. App.—Austin 2014, pet. denied).

<sup>42</sup> *Collins v. Tex. Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 883 (Tex. App.—Austin 2002).

<sup>43</sup> Affidavit of Ashley Lewis, Attachment B.

by Prairie Crossing are related to the Application and the Facility's proposed effluent discharge, and thus, a more logical method for measuring distance between the Facility and the Prairie Crossing Facility would not be a straight-line distance, but rather the distance between the points where both facilities would be discharging into the same water body. The outfall at the Facility and the outfall at the Prairie Crossing Facility would eventually discharge into Brushy Creek.<sup>44</sup> At no point, however, would any of Epitome's discharged treated effluent impact the Prairie Crossing Facility because of its route along a separate stream course.<sup>45</sup> Not only then is Prairie Crossing too far away to have a personal justiciable interest based on physical distance, it can hardly claim to be an affected person when at no point will any of the effluent discharged by Epitome actually affect the Prairie Crossing Facility.

*b. Regionalization*

Perhaps aware of this deficiency, in its request for a hearing Prairie Crossing notes that it "has a particular interest in the issues relevant to the Application because the Application is serviceable within Prairie Crossing's proposed service area and is contrary to TCEQ regionalization policy."<sup>46</sup> As demonstrated in Section III.a. above, Epitome not only complied with the regionalization policy, but it also went beyond the requirements by engaging with Prairie Crossing in the first place. The regionalization policy is concerned with existing facilities. Because

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<sup>44</sup> See Affidavit of Ashley Lewis, Attachment B, Exhibit 1.

<sup>45</sup> *Id.*

<sup>46</sup> Prairie Crossing Wastewater, LLC, *Public Comments, Request for Public Meeting, and Hearing Request Application for Proposed TPDES Permit No. WQ0016226001*, at 7. Likewise, the requests of 05 Ranch Investments and Prairie Crossing Municipal Utility Districts 1 & 2 contain similar statements on regionalization. See 05 Ranch Investments, *Public Comments, Request for Public Meeting, and Hearing Request Application for Proposed TPDES Permit No. WQ0016226001*, at 7 ("05 Investments has a particular interest in the issues relevant to the Application because it is the underlying landowner of Prairie Crossing's permitted facility and the Application is serviceable within Prairie Crossing's proposed service. Additionally, 05 Investments contends the Application is contrary to TCEQ regionalization policy."); Prairie Crossing Municipal Utility Districts 1 & 2, *Public Comments, Request for Public Meeting, and Hearing Request Application for Proposed TPDES Permit No. WQ0016226001*, at 7 ("Additionally, the Application is serviceable within the area Prairie Crossing MUDs provide services in within Williamson County and the Application is contrary to TCEQ regionalization policy.")

the Prairie Crossing Facility is not an existing facility, Prairie Crossing cannot use regionalization as a lifeline to garner it affected person status when it otherwise is not entitled to it.

*c. Nuisance Odors*

Prairie Crossing lastly alleges that it will be adversely affected by nuisance odors from the Facility. Here, perhaps consideration of the straight-line measurement of 1.4 miles between the Epitome Facility's proposed location and the proposed Prairie Crossing Facility location is useful. TCEQ regulations require that wastewater treatment plants, such as the Facility, be located not closer than 150 feet from the nearest property line.<sup>47</sup> Epitome complies with this standard, and the Prairie Crossing Facility location, being approximately 7,392 feet away, is nearly 50 times further away from Epitome's proposed Facility location than the distance deemed by TCEQ as necessary to guard against nuisance odors.

Moreover, Prairie Crossing fails to show how the claimed nuisance odors affect it in a manner not common to the general public. In fact, in 05 Ranch Investments' request, the entity makes clear that it is impacted by nuisance odors in the *same* manner as the public: "05 Investments contends that Epitome's failure to meet buffer zone requirements and a noise and odor abatement plan likely will adversely affect the quality of life *of nearby residents and the public, including 05 Investments as a nearby landowner.*"<sup>48</sup>

Because Prairie Crossing has failed to show that it has affected person status, Prairie Crossing has not met the requirements to be granted a contested case hearing, and its request should be denied.

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<sup>47</sup> 30 TEX. ADMIN. CODE § 309.13(e)(1).

<sup>48</sup> 05 Ranch Investments, *Public Comments, Request for Public Meeting, and Hearing Request Application for Proposed TPDES Permit No. WQ0016226001*, at 7 (emphasis added).

#### **IV. Hearing Request of Patricia Daffin**

Epitome takes no position as to whether Patricia Daffin should be granted affected person status.

#### **V. Potential Issues for Referral**

To the extent the Commission determines that one or more hearing requestors are affected persons, the Commission must determine which issues should be referred to the State office of Administrative Hearings (“SOAH”) for consideration in a contested case hearing.<sup>49</sup> The Commission is required to limit the number and scope of issues that are referred to SOAH for hearing.<sup>50</sup>

The issues raised in the hearing requests of Prairie Crossing, Ms. Daffin, or both, have been addressed by the ED’s Response to Comments and by this Response, as demonstrated below:

##### Issue No. 1: Regionalization

Both Prairie Crossing and Ms. Daffin contend that the Facility fails to comply with the State’s regionalization policy. This was addressed in the ED’s Response 4, and by this Response. The ED notes that applicants for a TPDES permit “are required to provide copies of all correspondence with the owners of *existing* plants within a three-mile radius” and that Epitome has “contacted *all facilities* within a three-mile radius.”<sup>51</sup> As demonstrated by the ED, and further explained in Section III.a., above, Epitome contacted every facility, existing or not, within the specified radius, when the requirement is only that an applicant contact *existing* facilities. Nonetheless, the ED notes that “Epitome has been in discussion with Prairie Crossing and is

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<sup>49</sup> See TEX. WATER CODE § 5.556.

<sup>50</sup> *Id.*

<sup>51</sup> Response to Public Comment at 7 (emphasis added).

willing to tie into Prairie Crossing MUD if their development schedules line up and the cost to connect is more beneficial to building a new plant.”<sup>52</sup> However, Prairie Crossing has failed to provide the information necessary for Epiteome to make this determination.<sup>53</sup> It is Epiteome’s position that this issue is not one that is relevant and material, and thus should not be referred to SOAH. However, if the Commission does refer this issue to SOAH, Epiteome respectfully requests that the issue be framed as follows: “Whether the applicant complied with the regionalization policy requirement regarding existing facilities within a three-mile radius of a proposed facility.”

#### Issue No. 2: Epiteome’s Final Phase

Both Prairie Crossing and Ms. Daffin contend that the Final Phase contained in the Draft Permit and the Application is not needed. The ED fully addressed this concern by breaking down the number and type of connections and the per-connection needs of each.<sup>54</sup> The justification for the Final Phase is more fully explained in Attachment K of the Application, in which Epiteome includes a table with the projected growth over the next several years in single family residential, apartment, and commercial development.<sup>55</sup> Because the Application mathematically explains the need for the Final Phase, it is Epiteome’s position that this issue is not relevant and material and should not be referred to SOAH.

#### Issue No. 3: Antidegradation, Livestock Watering, Recreational Use

Both Prairie Crossing and Ms. Daffin contend that the proposed discharge in the Draft Permit does not comply with the TCEQ’s antidegradation policy. Ms. Daffin separately expresses concern about livestock watering and recreational use. These concerns too are fully addressed in the Response to Public Comment. According to the ED, the Draft Permit “was

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<sup>52</sup> *Id.*

<sup>53</sup> See Affidavit of Eric Vann, Attachment A.

<sup>54</sup> Response to Public Comment at 8.

<sup>55</sup> Application, Attachment K, at 96.

developed in accordance with the [Texas Surface Water Quality Standards] to be protective of water quality, provided that the facility is operated and maintained according to TCEQ rules and permit requirements.”<sup>56</sup> Further, “an antidegradation review of the receiving waters was performed” which “has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained.”<sup>57</sup> Accordingly, it is Epitome’s position that this issue is not relevant and material and should not be referred to SOAH. If the Commission refers this issue to SOAH, Epitome respectfully requests that the issue be framed as follows: “Whether the draft permit is protective of existing uses of the receiving waters, aquatic life, flora, and fauna, in accordance with applicable regulations.”

#### Issue No. 4: Sewage Sludge Solids Management Plan

Both Prairie Crossing and Ms. Daffin contend that the Facility may become a public nuisance because the Applicant does not demonstrate TCEQ-compliant disposal of biosolids. In fact, as noted by the ED, pages 17–33 of the Draft Permit contain the exact provisions on disposal of biosolids that Prairie Crossing and Ms. Daffin contend are missing. When TCEQ issues permits, it does so with compliance in mind, not with “speculation of failure” to comply.<sup>58</sup> This is a non-issue from the start. Accordingly, this issue is not a relevant and material issue and should not be considered for referral to SOAH.

#### Issue No. 5: Nuisance Odors

Both Prairie Crossing and Ms. Daffin contend that the Application does not contain an adequate buffer zone or a noise and odor abatement plan. Epitome has provided diagrams which

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<sup>56</sup> Response to Public Comment, at 9.

<sup>57</sup> *Id.* at 2.

<sup>58</sup> See *Collins v. Tex. Nat. Res. Conservation Comm’n*, 94 S.W.3d 76, 883–84 (Tex. App. 2002).

demonstrate how it will meet the buffer zone requirements and included those as part of the Draft Permit.<sup>59</sup> Further, the Application makes clear that the buffer zone will be maintained in the Interim Phase by ownership, and in the Final Phase by restrictive easements.<sup>60</sup> The ED's Response to Public Comment further notes that the buffer zone will satisfy Epitome's odor control requirements and that additionally, Epitome will use an aerobic biological process and maintain a minimum level of 4.0 mg/l of dissolved oxygen to abate odors.<sup>61</sup> No requirement to submit a noise abatement plan exists, and thus the issue of noise is not one that is relevant and material and should not be considered for referral to SOAH. It is also Epitome's position that the odor issue is not relevant and material and should not be referred to SOAH. If the Commission decides to refer the odor issue to SOAH, Epitome respectfully requests that the issue be framed as follows: "Whether the draft permit adequately protects against nuisance odors in accordance with 30 TAC § 309.13."

#### Issue No. 6: Descriptions in Application

Both Prairie Crossing and Ms. Daffin contend that the Application is incomplete in its description of immediate receiving waters, stream physical characteristics, and discharge creek path. The ED's Response to Public Comment shows this is simply not the case. Epitome "correctly identified the immediate receiving water as an unnamed tributary and noted . . . that there is a man-made dam approximately 0.3 miles downstream of the proposed outfall. TCEQ technical staff also independently verified the immediate receiving waters and the discharge route downstream to the first classified segment."<sup>62</sup> Further, Domestic Worksheet 2.1 of the application regarding the "Description of Stream Physical Characteristics" is "only required for discharges to perennial

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<sup>59</sup> See *id.* at 10; Draft Permit Attachment A, Attachment B.

<sup>60</sup> Application, at 22.

<sup>61</sup> Response to Public Comment, at 11.

<sup>62</sup> *Id.* at 12.

streams and intermittent streams with perennial pools.”<sup>63</sup> That is not the case with this Application, and therefore no such description is necessary. Lastly, Epitome provided an updated map with the discharge route highlighted, as pointed out by the comments of Prairie Crossing. Accordingly, these issues are not relevant and material and should not be considered for referral to SOAH.

#### Issue No. 7: Notice

Ms. Daffin contends that she was not given sufficient notice in time to make sufficient comments on the Application. Epitome and TCEQ complied with all notice requirements, as detailed above in Section II. Accordingly, this issue is not relevant and material and should not be considered for referral to SOAH.

#### Issue No. 8: Volume of Discharge

Ms. Daffin disputes the ED’s response related to the volume of discharge from the Facility. This information is contained in the Application and the Draft Permit. Accordingly, this issue is not relevant and material and should not be considered for referral to SOAH.

#### Issue No. 9: Overflow

Ms. Daffin remains concerned about overflow from the Facility. As detailed by the ED, the Draft Permit contains provisions which “prohibits the unauthorized discharge of wastewater or any other waste and includes appropriate requirements.”<sup>64</sup> As previously stated, when TCEQ issues permits, it does so with compliance in mind, not with “speculation of failure” to comply.<sup>65</sup> Accordingly, this issue is not relevant and material and should not be considered for referral to SOAH.

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 5.

<sup>65</sup> See *Collins v. Tex. Nat. Res. Conservation Comm’n*, 94 S.W.3d 76, 883–84 (Tex. App. 2002).

## **VI. Maximum Duration of Hearing**

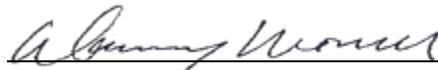
Should the Commission decide to refer this case to SOAH for a hearing, given the limited number and scope of issues Applicant believes may be appropriate in this case, the maximum expected duration of a hearing on this Application and Draft Permit should be no longer than 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

## **VII. Conclusion and Prayer**

For the foregoing reasons, Epitome respectfully requests that the Commission deny the requests for contested case hearing, approve the Executive Director's Response to Public Comment, and issue TPDES Permit. No WQ0016226001 as recommended by the Executive Director.

Dated: July 10, 2023

Respectfully Submitted,



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Danny G. Worrell  
State Bar No. 22002000  
Cole Lempke  
State Bar No. 24131455  
Baker Botts L.L.P.  
401 South 1st Street  
Suite 1300  
Austin, Texas 78704  
512.322.2500 (phone)  
512.322.2501 (fax)

***ATTORNEYS FOR EPITOME  
DEVELOPMENT LLC***

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Epitome Development LLC's Response to Requests for Contested Case Hearing has been served on the following counsel/persons by certified U.S. Mail, electronic mail, or with the Chief Clerk, by electronic service on this 10th day of July, 2023.

**FOR THE EXECUTIVE DIRECTOR**

via electronic mail:

Aubrey Pawelka, Staff Attorney  
Texas Commission on Environmental  
Quality  
Environmental Law Division, MC-173  
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Sonia Bhuiya, Technical Staff  
Texas Commission on Environmental  
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Ryan Vise, Deputy Director  
Texas Commission on Environmental  
Quality  
External Relations Division  
Public Education Program, MC-108  
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**FOR PUBLIC INTEREST COUNSEL**

via electronic mail:

Garrett T. Arthur, Attorney  
Texas Commission on Environmental  
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Public Interest Counsel, MC-103  
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**FOR ALTERNATIVE DISPUTE  
RESOLUTION**

via electronic mail:

Kyle Lucas  
Texas Commission on Environmental  
Quality  
Alternative Dispute Resolution, MC-222  
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Austin, Texas 78711-3087  
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**FOR THE CHIEF CLERK:**

via eFilings:

<https://www14.tceq.texas.gov/epic/eFiling/>  
Docket Clerk  
Texas Commission on Environmental  
Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300  
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**REQUESTER(S):**

via certified U.S. mail:

Nathan E. Vassar  
Lloyd Gosselink Rochelle & Townsend PC  
816 Congress Avenue, Suite 1900  
Austin, Texas 78701

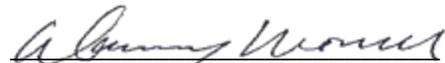
Wesley D. West  
505 West 12<sup>th</sup> Street, Suite 200  
Austin, Texas 78701

**INTEREST PERSONS**

via certified U.S. mail:

Paul Burrough  
464 Fox Road  
Weatherford, Texas 76088

Patricia Ann Daffin  
2950 FM 3349  
Taylor, Texas 76574

  
\_\_\_\_\_  
Danny G. Worrell

**TCEQ DOCKET NO. 2023-0571-MWD**

<b>APPLICATION BY</b>	<b>§</b>	<b>BEFORE THE TEXAS COMMISSION</b>
<b>EPITOME DEVELOPMENT LLC</b>	<b>§</b>	
<b>FOR NEW WASTEWATER</b>	<b>§</b>	<b>ON</b>
<b>TPDES PERMIT</b>	<b>§</b>	
<b>NO. WQ0016226001</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

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**EPITOME DEVELOPMENT LLC'S RESPONSE  
TO REQUESTS FOR CONTESTED CASE HEARING**

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# **Attachment A**

TCEQ DOCKET NO. 2023-0571-MWD

APPLICATION BY	§	BEFORE THE TEXAS COMMISSION
EPITOME DEVELOPMENT LLC	§	
FOR TPDES PERMIT	§	ON
NO. WQ0016226001	§	
	§	ENVIRONMENTAL QUALITY

AFFIDAVIT OF ERIC VANN

STATE OF TEXAS	§
COUNTY OF TRAVIS	§

Before me, the undersigned Notary Public in and for the State of Texas, personally appeared Eric Vann, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

1. My name is Eric Vann. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts in this affidavit are within my personal knowledge and are true and correct.
2. I am a Professional Engineer and a Project Manager at Quiddity Engineering LLC (“Quiddity”). My experience includes more than 5 years of work in engineering services. I have a Bachelor of Engineering from Montana State University-Bozeman.
3. I have prepared this affidavit in support of Applicant Epitome Development LLC’s (“Epitome”) Response to Requests for Contested Case Hearing related to proposed TPDES Permit No. WQ0016226001 (the “Permit”), which would authorize the discharge of treated domestic wastewater from a wastewater treatment facility in Williamson County, Texas.
4. As part of the application for the Permit (the “Application”) Quiddity completed Domestic Technical Report 1.1, pursuant to which Quiddity conducted a regionalization analysis. At the time of submitting the Application, and as of the date of this affidavit, there are no existing wastewater treatment facilities or collection systems within a three-mile radius of Epitome’s proposed facility.
5. On page 22 of the Domestic Technical Report, Quiddity marked that a permitted wastewater treatment facility was located within a three-mile radius of Epitome’s proposed facility. This permitted, but non-existent, facility belongs to Prairie Crossing Wastewater, LLC (“Prairie Crossing”), which was issued TPDES Permit No. WQ0015850001 on March 5, 2021.
6. Despite the non-existence of a wastewater treatment facility located within a three-mile radius of Epitome’s proposed facility, Quiddity communicated by email with the management of two wastewater treatment plants: Mark Daurity, Wastewater Treatment Plant Supervisor of the City of Taylor plant, which is more than three miles from

# Attachment A

Epitome's; and Matthew Tiemann, General Manager of Prairie Crossing, whose plant does not physically exist. Communications to both plants took place on April 4, 2022.

7. To date, Quiddity has received no response from the City of Taylor regarding Quiddity's April 4, 2022, correspondence.
8. To date, Quiddity has not received a response from Prairie Crossing sufficient to ensure that Prairie Crossing has the capacity and ability to support Epitome's wastewater needs. Specifically, Prairie Crossing has not given Quiddity the necessary information for Quiddity to (a) determine the technical feasibility of Prairie crossing providing wastewater treatment services for Epitome; (b) determine if Prairie Crossing's construction and development schedule for its facility is consistent with Epitome's schedule; (c) determine the total cost assessment of connecting to Prairie Crossing's wastewater system and providing wastewater services; or (d) determine if there are any additional conditions for receiving service by Prairie Crossing.
9. Without the information described above in Item 8, Epitome cannot engage in a regionalization analysis with Prairie Crossing.

Eric C Vann

Sworn and subscribed before me by Eric C. Vann on this 15 day of June, 2023.

Karen Jeffreys

Notary Public in and for the State of Texas  
My commission expires: June 26, 2026



**TCEQ DOCKET NO. 2023-0571-MWD**

<b>APPLICATION BY</b>	<b>§</b>	<b>BEFORE THE TEXAS COMMISSION</b>
<b>EPITOME DEVELOPMENT LLC</b>	<b>§</b>	
<b>FOR NEW WASTEWATER</b>	<b>§</b>	<b>ON</b>
<b>TPDES PERMIT</b>	<b>§</b>	
<b>NO. WQ0016226001</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

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**EPITOME DEVELOPMENT LLC'S RESPONSE  
TO REQUESTS FOR CONTESTED CASE HEARING**

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# **Attachment B**

# Attachment B

## TCEQ DOCKET NO. 2023-0571-MWD

APPLICATION BY § BEFORE THE TEXAS COMMISSION  
EPITOME DEVELOPMENT LLC §  
FOR NEW WASTEWATER § ON  
TPDES PERMIT §  
NO. WQ0016226001 § ENVIRONMENTAL QUALITY

### AFFIDAVIT OF ASHLEY LEWIS

STATE OF TEXAS §  
COUNTY OF TRAVIS §

Before me, the undersigned Notary Public in and for the State of Texas, personally appeared Ashley Lewis, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

1. My name is Ashley Lewis. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts in this affidavit are within my personal knowledge and are true and correct.
2. I am a Project Manager with Alan Plummer and Associates, Inc. (dba Plummer Associates, Inc.). My experience includes more than 7 years of work in environmental services, including experience with wastewater permitting. I have a Bachelor of Science in Wildlife Biology from Texas State University and a Master of Science in Data Analytics from the University of North Texas.
3. I have prepared this affidavit in support of Applicant Epitome Development LLC's ("Epitome") Response to Requests for Contested Case Hearing related to TPDES Permit No. WQ0016226001, which would authorize the discharge of treated domestic wastewater from a wastewater treatment facility in Williamson County, Texas.
4. As part of my work with Epitome, I am very familiar with the proposed location of Epitome's wastewater treatment plant and the surrounding areas, including the proposed location for the Prairie Crossing Wastewater Treatment Facility to be located approximately 1 mile northeast of the intersection of County Road 485 and Farm-to-Market Road 9, in Williamson County, Texas (the "Prairie Crossing Facility").
5. To determine the locations of the proposed Prairie Crossing Facility and its associated proposed discharge outfall location, I used the map coordinates 30.503385, -97.441022 from TCEQ's Wastewater Outfall Viewer.<sup>1</sup> The map coordinates are consistent with Prairie Crossing Wastewater, LLC's ("Prairie Crossing's") TPDES Permit No. WQ0015850001

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<sup>1</sup> Texas Commission on Environmental Quality, *Wastewater Outfalls Viewer*, <https://www.tceq.texas.gov/gis/wastewater-outfalls-viewer> (last visited June 6, 2023).

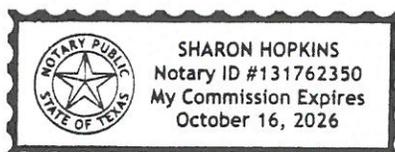
# Attachment B

issued by the Texas Commission on Environmental Quality on March 5, 2021, and the application submitted by Prairie Crossing to TCEQ on January 21, 2020.

6. I plotted the locations for the Prairie Crossing Facility and discharge outfall location using the map coordinates on a scaled map on which I had also plotted Epitome's proposed wastewater treatment facility and its discharge outfall. Following plotting of the locations on the scaled map, I was able to measure the distance between the two facilities and outfall locations. The facilities are approximately 1.4 miles apart in the shortest straight-line direction. Epitome's proposed outfall location is approximately 6.8 miles upstream of Brushy Creek. Prairie Crossing's outfall location is approximately 5.9 miles upstream of Brushy Creek. The outfall locations are approximately 3.6 miles apart measured along Brushy Creek between the two locations. Due to the geographic locations of each facility, any discharged effluent at Epitome's outfall would not intersect with the discharges from Prairie Crossing until the confluence of Boggy Creek and Brushy Creek, which is 5.9 miles away from the Prairie Crossing outfall. At no point would Epitome's discharge, because of its route along a separate stream course, impact the location of the Prairie Crossing Facility. The background imagery of the map was obtained from the Texas Natural Resource Information System (TNRIS). Use of map coordinates to identify the locations of items of interest on a scaled map is an accurate and reliable technique for locating items of interest on a map. In addition, a scaled map, such as that attached as Exhibit 1, is an accurate and reliable technique for demonstrating the distances between various locations. Both techniques are frequently used by environmental professionals such as me. The information depicted on Exhibit 1 is accurate and reliable as of April 28, 2023.
7. On April 26, 2023, I visited the location of the proposed Prairie Crossing Facility and took the photographs attached as Exhibit 2. Analysis of Exhibit 2 confirms that there is no facility currently operating, or existing, at this location. There is also no construction or development for such a facility taking place at this location. Further, the photographs attached as Exhibit 2 demonstrate that there are no residential or commercial construction or developments in the area around the proposed Prairie Crossing Facility. Documenting the status of operations and construction of a permitted wastewater facility through physical visitation and photography is an accurate and reliable technique frequently used by environmental professionals such as me. The photographs depicted in Exhibit 2 are accurate and reliable as of April 26, 2023.

Ashley Lewis

Sworn and subscribed before me by Ashley Lewis on this 7<sup>th</sup> day of July 2023.



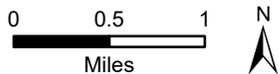
Sharon Hopkins

# Attachment B

Notary Public in and for the State of Texas  
My commission expires: October 16, 2024



Source: TNRIS NAIP and USGS National Hydrography Data



**Exhibit 1**  
**Epitome and Prairie Crossing**  
**Approximate Stream Distances**

**Legend**

- EPITOME DEVELOPMENT LLC
- PRAIRIE CROSSING WASTEWATER LLC
- NHDFlowline

## Exhibit 2



30.511492, -97.452933  
Facing East

**Exhibit 2**



30.511336, -97.452758  
Facing East

## Exhibit 2



30.511347, -97.452836  
Facing East

## Exhibit 2



30.499781, -97.43595  
Facing West

## Exhibit 2



30.499886, -97.436006  
Facing West

## Exhibit 2



30.499983 , -97.434861  
Facing West