

TCEQ DOCKET NO. 2023-0863-MWD

APPLICATION BY SMILING MALLARD	§	BEFORE THE TEXAS
DEVELOPMENT, LTD. FOR NEW	§	COMMISSION ON
TPDES PERMIT NO. WQ0016077001	§	ENVIRONMENTAL QUALITY

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EXECUTIVE DIRECTOR'S RESPONSE TO HEARING REQUESTS

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I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Hearing Requests on the application by Smiling Mallard Development, Ltd. (Applicant) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016077001, authorizing the discharge of treated domestic wastewater at a daily average flow not to exceed a daily average flow of 100,000 or 0.1 million gallons per day (proposed discharge) from the Smiling Mallard Site # 2 Facility (proposed facility). Herb Flanagan, Lanell Flanagan, Bret Richards, Jean Ragusa, Melisa Wagner, Cynthia Werner, Warren Wall, Jamie Thomas, and Shana Elliot filed timely, written Requests for a Contested Case Hearing.

II. ATTACHMENTS FOR COMMISSION CONSIDERATION

- Attachment A - ED's GIS Map

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

**A. FACILITY**

The proposed facility will be located approximately 2,000 feet southwest of the intersection of Mesa Verde Drive and State Highway 6, in Brazos County, Texas 77845, serve the Mesa Verde Commercial Development at the Villages of Indian Lakes, and will be an activated sludge process plant operated in the conventional mode. Treatment units include bar screens, an aeration basin, a final clarifier, two aerobic sludge digesters, and a chlorine contact chamber. The route of the proposed discharge is to an unnamed tributary of Peach Creek, then to Peach Creek, then to the Navasota River Below Lake Limestone in Segment No. 1209 of the Brazos River Basin.

**B. DISCHARGE ROUTE/RECEIVING WATERS**

The route of the proposed discharge is to an unnamed tributary of Peach Creek, then to Peach Creek, then to the Navasota River Below Lake Limestone in Segment No. 1209 of the Brazos River Basin.

Segment No. 1209 is currently listed on the State's inventory of impaired and threatened waters (the 2020 CWA § 303(d) list). The listing is for bacteria in the portion of Navasota River from the confluence with Camp Creek upstream to Lake Limestone Dam, in Robertson County (Assessment Unit [AU] 1209\_05). However, the proposed permit includes a requirement that the Applicant use chlorine for disinfection and a bacteria limit of 126 colony forming units (CFU) or most probable number (MPN) of *E. coli* per 100 ml, and this facility, when operated properly, is designed to provide adequate disinfection, and should not add to the bacterial impairment of the segment.

Total Maximum Daily Load (TMDL) Project No. 111 has been approved for this segment: *Two Total Maximum Daily Loads for Indicator Bacteria in the Navasota River below Lake Limestone*. On August 28, 2019, the TCEQ adopted *Two Total Maximum Daily Loads for Indicator Bacteria in the Navasota River below Lake Limestone*. The EPA approved the TMDLs on October 25, 2019. The TMDL addresses elevated levels of bacteria in one classified segment (Navasota River Below Lake Limestone - 1209, AUs \_03 and \_05) of this watershed. This project takes a watershed approach, but the TMDL only applies to AU 1209\_03 and the AUs and additional unclassified segments upstream of it (1209\_04, 1209\_05, 1209\_H, 1209G, 1209J, 1209K, and 1209P).

The waste load allocation (WLA) for WWTFs was established as the final permitted flow for each WWTF multiplied by the geometric mean criterion for bacteria multiplied by a conversion factor (to get to units per day). The allocated loads were calculated for *Escherichia coli* (*E. coli*). Future growth from existing or new permitted sources is not limited by these TMDLs if the sources do not exceed the limits provided. To ensure that the effluent limits in the proposed permit are consistent with the WLAs provided in the TMDL, a concentration-based effluent limitation of 126 CFU or MPN per 100 ml for *E. coli* was added to the proposed permit.

### ***C. ED'S TECHNICAL REVIEW***

The TCEQ has primary authority over water quality in Texas and federal regulatory authority for the TPDES program, which controls discharges of pollutants into Texas surface waterbodies ("water in the state"). The Texas Water Code (TWC) section (§) 26.027, authorizes the TCEQ to issue permits for discharges into *water in the state*, and the ED evaluates applications for discharge permits based on the information provided in the application and can recommend issuance or denial of an application based on its compliance with the TWC and TCEQ rules. Specifically, the ED's review evaluates impacts from the proposed discharge on the receiving waters in the route for the proposed discharge, starting at the discharge point (unnamed tributary of Peach Creek), according to 30 TAC Chapter 307, the Texas Surface Water Quality Standards (TSWQS) and the TCEQ's *Implementation Procedures for the Texas Surface Water Quality Standards-June 2010* (IPs).

The Technical Review process for surface water quality is conducted collectively by staff in the ED's Water Quality Division (WQD staff) on the Standards Implementation Team (Standards Team) and WQD staff on the Water Quality Assessment Team (WQA Team). Both Teams reviewed the application in accordance with the TSWQS and TCEQ's IPs with the goal of maintaining a level of water quality sufficient to protect the existing uses of the receiving surface waters.

The first component of the ED's Technical Review involves WQD staff on the Standards Team reviewing the classifications, designations, and descriptions of the receiving surface waters in the state within the route of the proposed discharge. Other available information and a receiving water assessment allowed the Standards Team to preliminarily determine the aquatic life uses in the proposed discharge's possible area of possible impact and assign the corresponding Minimum Dissolved Oxygen Criterion (DO limit) as stipulated at 30 TAC § 307.5 (TSWQS) and in the TCEQ's IPs.

The designated uses for Segment No. 1209, as stated in the 2018 TSWQS-Appendix A (30 TAC § 307.10) are primary contact recreation, public water supply, and high aquatic life use, and 5.0 mg/L DO. Through his Technical Review, the ED provides the proper effluent limits to protect these uses.

For all applications for new discharges, the Standards Team performs an antidegradation analysis of the proposed discharge and the receiving waters according to 30 TAC § 307.5 of the TSWQS and TCEQ's IPs. Correspondingly, the Tier 1 antidegradation review preliminarily determined that existing water quality uses will not be impaired by this permit action because numerical and narrative criteria to protect existing uses will be maintained.

Because the proposed discharge is directly to an unnamed tributary, an unclassified water body, the Standards Team reviewed this permitting action in conformity with 30 TAC §§ 307.4(h) and (l) of the TSWQS. The Standards Team determined that the unclassified receiving water uses and DO criterion are minimal aquatic life use and 2.0 mg/L DO for the unnamed tributary and minimal aquatic life use and a 3.0 mg/L DO criterion for Peach Creek. Because this review preliminarily determined that no water bodies with exceptional, high, or intermediate aquatic life uses were present within the stream reach assessed, a Tier 2 antidegradation review was not performed. However, significant degradation of water quality is not expected in water bodies with exceptional, high, or intermediate aquatic life uses downstream, and the existing water quality uses will be maintained and protected.

The second component of the ED's Technical Review involves WQD staff on the Modeling Team performing water quality modeling runs, or Dissolved Oxygen (DO) analyses, using a mathematical model; in this case, an uncalibrated QUAL-TX model.

Conventional effluent limits such as DO, Five-day Carbonaceous Biochemical Oxygen Demand (CBOD<sub>5</sub>), Total Suspended Solids (TSS), and Ammonia Nitrogen (NH<sub>3</sub>-N), are based on stream standards and WLAs for water quality-limited streams promulgated by the TSWQS and the State of Texas Water Quality Management Plan.

The proposed permit's effluent limits, established by the Modeling Team's results using an "uncalibrated QUAL-TX" model, of 10.0 mg/L CBOD<sub>5</sub>, 3.0 mg/L NH<sub>3</sub>-N, and 4.0 mg/L DO, based on a 30-day average will maintain, and protect the existing instream uses. Specifically, the proposed limits above are predicted to be adequate to maintain DO levels above the criteria stipulated by the Standards Team for the unnamed tributary (2.0 mg/L), Peach Creek (3.0 mg/L), and the Navasota River Below Lake Limestone in Segment No. 1209 of the Brazos River Basin (5.0 mg/L).

The effluent limits and conditions in the proposed permit meet requirements for secondary treatment and disinfection according to 30 TAC Chapter 309 (Subchapter A: Effluent Limits) and comply with the TSWQS (30 TAC §§ 307.1-.10, effective 7/22/2010), and the EPA-approved portions of the TSWQS (effective 3/6/2014). In a case such as this, end-of-pipe compliance with pH limits between 6.0 and 9.0 standard units reasonably assures instream compliance with pH criteria in the TSWQS when the discharge authorized is from a minor facility and the unclassified waterbodies have minimal or limited aquatic life uses. This technology-based approach reasonably assures instream compliance with TSWQS due to relatively smaller discharge volumes authorized by these permits. TCEQ sampling conducted throughout Texas indicating instream buffering quickly restores pH levels to ambient conditions, informs this conservative approach.

The Houston toad (*Bufo houstonensis* Sanders), an endangered aquatic-dependent species of critical concern, occurs within Segment No. 1209's watershed. This determination is based on the United States Fish and Wildlife Service's (USFWS) biological opinion on the Texas' authorization of the TPDES permitting program (TPDES; September 14, 1998, October 21, 1998 update). To make this determination for

TPDES permits, TCEQ and EPA only consider aquatic or aquatic dependent species occurring in watersheds of critical concern or high priority as listed in Appendix A of the USFWS biological opinion. The permit does not require EPA review with respect to the presence of endangered or threatened species. However, the determination is subject to reevaluation due to subsequent updates or amendments to the biological opinion. Species distribution information for the Segment No. 1209 watershed is provided by the USFWS and documents the toad's presence solely in the vicinity of Running Creek in Leon County, which is farther up the watershed from the facility associated with this permit action. Based upon this information, it is determined that the proposed facility's discharge is not expected to impact the Houston toad.

Through the Technical Review, the ED provides the proper limits to maintain and protect the existing instream uses. Coefficients and kinetics used in the water quality modeling are a combination of site-specific, standardized default, and estimated values. However, as with all determinations, reviews, or analyses related to the technical review of the proposed permit, the above can be reexamined and subsequently modified upon receipt of new information or information that conflicts with the bases employed in the applicable review or analysis.

#### IV. PROCEDURAL HISTORY

The TCEQ received the application on November 29, 2021, and declared it administratively complete on March 15, 2021. The Applicant published the Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) in Brazos County, Texas in the *Eagle Newspaper* on March 18, 2022. The ED completed the technical review of the application on April 21, 2022, and prepared the proposed permit, which if approved, would establish the conditions under which the proposed facility must operate. The Applicant published the Notice of Application and Preliminary Decision (NAPD) in Brazos County, Texas in the *Eagle Newspaper* on May 25, 2022. The public comment period ended on June 24, 2022, and the ED's original RTC was filed on August 3, 2022. On September 1, 2022, the ED approved a Public Meeting Request from Texas State Representative Kyle Kacal. On December 8, 2022, the Applicant published the Notice of Public Meeting in the *Eagle Newspaper*. On January 23, 2023, at 7:00pm, a Public Meeting was held at the Embassy Suites in College Station, located at 201 University Drive East, 77840. The reopened comment period closed on January 23, 2023, at the close of the Public Meeting., the ED's Amended RTC was filed on April 18, 2023, and the ED's Final Decision Letter mailed out on April 11, 2023. The deadline for filing a Request or a Request for Reconsideration (RFR) was May 25, 2023. Because this application was received after September 1, 2015, and because it was declared administratively complete after September 1, 1999, it is subject to both the procedural requirements adopted pursuant to House Bill 801, 76th Legislature, 1999, and the procedural requirements and rules implementing Senate Bill 709, 84<sup>th</sup> Legislature, 2015, which are implemented by the Commission in its rules in 30 TAC Chapters 39, 50, and 55.

#### V. ACCESS TO RULES, LAWS AND RECORDS

- All administrative rules: Secretary of State Website: [www.sos.state.tx.us](http://www.sos.state.tx.us)
- TCEQ rules: Title 30 of the Texas Administrative Code: [www.sos.state.tx.us/tac/](http://www.sos.state.tx.us/tac/) (select TAC Viewer on the right, then Title 30 Environmental Quality)
- Texas statutes: [www.statutes.capitol.texas.gov](http://www.statutes.capitol.texas.gov)

- TCEQ website: [www.tceq.texas.gov](http://www.tceq.texas.gov) (for downloadable rules in WordPerfect or Adobe PDF formats, select “Rules, Policy, & Legislation,” then “Current TCEQ Rules,” then “Download TCEQ Rules”);
- Federal rules: Title 40 of the Code of Federal Regulations (C.F.R.)  
[http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title40/40tab\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title40/40tab_02.tpl)
- Federal environmental laws: <http://www.epa.gov/lawsregs/>
- Environmental or citizen complaints may be filed electronically at:  
<https://www.tceq.texas.gov/assets/public/compliance/monops/complaints/complaints.html> (select “use our online form”) or by sending an email to the following address: [complaint@TCEO.texas.gov](mailto:complaint@TCEO.texas.gov)

Commission records for the proposed facility are available for viewing and copying at TCEQ’s main office in Austin, 12100 Park 35 Circle, Building F, 1st Floor (Office of Chief Clerk, for the current application until final action is taken). Some documents located at the Office of the Chief Clerk may also be located in the TCEQ Commissioners’ Integrated Database at [www.tceq.texas.gov/goto/cid](http://www.tceq.texas.gov/goto/cid). The permit application has been available for viewing and copying at the at the Brazos County Clerk’s Office located at East 26<sup>th</sup> Street, Suite 1430, Bryan, Texas 77083, since publication of the NORI. The final permit application, proposed permit, statement of basis/technical summary, and the ED’s preliminary decision are available for viewing and copying at the same location since publication of the NAPD.

Alternative language notice in Spanish is available at:

<https://www.tceq.texas.gov/permitting/wastewater/plain-language-summaries-and-public-notices>.

El aviso de idioma alternativo en español está disponible en <https://www.tceq.texas.gov/permitting/wastewater/plain-language-summaries-and-public-notices>.

The ED has determined that the proposed permit, if issued, meets all statutory and regulatory requirements and is protective of the environment, water quality, animal life, vegetation, and human health. However, if you would like to file a complaint about the proposed facility concerning its compliance with the provisions of its permit or with TCEQ rules, you may contact the TCEQ Regional Office (Region 9) in Waco, TX at (254) 751-0335 or the statewide toll-free number at 1-888-777-3186 to address potential permit violations. In addition, complaints may be filed electronically by using the methods described above at the last bullet point under, “Access to Rules, Laws, and Records.” If an inspection by the Regional Office finds that the Applicant is not complying with all the requirements of the permit, or that the Facility is out of compliance with TCEQ rules, enforcement actions may arise.

## VI. EVALUATION OF HEARING REQUESTS

House Bill 801 established statutory procedures for public participation in certain environmental permitting proceedings, specifically regarding public notice and public comment and the Commission’s consideration of hearing requests (Requests). The Commission implemented HB 801 by adopting procedural rules in 30 TAC chapters 39, 50, and 55. Senate Bill 709 revised the requirements for submitting public comment and the commission’s consideration of Requests. This application was declared administratively complete on September 14, 2022; therefore, it is subject to the procedural requirements adopted pursuant to both HB 801 and SB 709.

**A. LEGAL AUTHORITY TO RESPOND TO HEARING REQUESTS**

“The executive director, the public interest counsel, and applicant may submit written responses to [hearing] requests . . . .”<sup>1</sup>

1. whether the requestor is an affected person;
2. whether issues raised in the hearing request are disputed;
3. whether the dispute involves questions of fact or law;
4. whether the issues were raised during the public comment period;
5. whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter by filing a written withdrawal letter with the chief clerk prior to the filing of the ED’s Response to Comment;
6. whether the issues are relevant and material to the decision on the application; and
7. a maximum expected duration for the contested case hearing.<sup>2</sup>

**B. HEARING REQUEST REQUIREMENTS**

To consider a Request, the Commission must first conclude that the requirements in 30 TAC §§ 55.201 and 55.203, are met as follows.

A request for a contested case hearing by an affected person must be in writing, filed with the chief clerk within the time provided . . . , based only on the requestor’s timely comments, and not based on an issue that was raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the ED’s Response to Comment.<sup>3</sup>

A hearing request must substantially comply with the following:

- (1) give the name, address, telephone number, and where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and where possible, fax number, who is responsible for receiving all official communications and documents for the group;
- (2) identify the person’s justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor’s location and distance relative to the facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) for applications filed;

(B) on or after September 1, 2015, list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED’s responses to the requestor's comments

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<sup>1</sup> 30 TAC § 55.209(d).

<sup>2</sup> *Id.* at § 55.209(e).

<sup>3</sup> 30 TAC § 55.201(c).

that the requestor disputes, the factual basis of the dispute, list any disputed issues of law; and

(5) provide any other information specified in the public notice of application.<sup>4</sup>

**C. REQUIREMENT THAT REQUESTOR BE AN AFFECTED PERSON**

To grant a contested case hearing, the commission must determine, pursuant to 30 TAC § 55.203, that a requestor is an affected person.

- (a) For any application, an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the public does not qualify as a personal justiciable interest.
- (b) Governmental entities, including local governments and public agencies with authority under state law over issues raised by the application, may be considered affected persons.
- (c) In determining whether a person is an affected person, all factors shall be considered, including, but not limited to, the following:
  - (1) whether the interest claimed is one protected by the law under which the application will be considered;
  - (2) distance restrictions or other limitations imposed by law on the affected interest;
  - (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
  - (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
  - (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
  - (6) whether the requester timely submitted comments on the application which were not withdrawn; and
  - (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.<sup>5</sup>
- (d) In making this determination, the commission may also consider, to the extent consistent with case law:
  - (1) the merits of the underlying application and supporting documentation in the commission's administrative record, including whether the application meets the requirements for permit issuance;
  - (2) the analysis and opinions of the ED; and
  - (3) any other expert reports, affidavits, opinions, or data submitted by the ED, the applicant, or hearing requestor.<sup>6</sup>

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<sup>4</sup> *Id.* at § 55.201(d).

<sup>5</sup> 30 TAC § 55.203(a)-(c).

<sup>6</sup> *Id.* at § 55.203(d).

**D. REFERRAL TO THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

“When the commission grants a request for a contested case hearing, the commission shall issue an order specifying the number and scope of the issues to be referred to State Office of Administrative Hearing (SOAH) for a hearing.”<sup>7</sup> “The commission may not refer an issue to SOAH for a contested case hearing unless the commission determines that the issue:

- (1) involves a disputed question of fact or a mixed question of law and fact;
- (2) was raised during the public comment period by an affected person; and
- (3) is relevant and material to the decision on the application.”<sup>8</sup>

**E. REQUESTS FOR RECONSIDERATION**

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

**VII. ANALYSIS OF THE HEARING REQUESTS**

The ED’s analyses evaluated whether the Request followed TCEQ rules, if the requestor qualified as an affected person, what issues may be referred for a possible hearing, and the appropriate length of any hearing. The ED reviewed the Requests using the following analysis and respectfully recommends granting the Requests of Herb Flanagan, Lanell Flanagan, Bret Richards, Jean Ragusa, Melisa Wagner, Cynthia Werner, and denying the Requests of Shana Elliot, Jamie Thomas, and Warren Wall.

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

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

Mr. Flanagan’s Request complied with 30 TAC §§ 55.201(c), and (d) because it effectively identified a personal justiciable interest in a written explanation plainly describing why Mr. Flanagan believes he will be affected by the application differently than the public. Mr. Flanagan’s Request stated he and his family live in proximity to the proposed facility and raised issues relevant to a decision on the application, such as adverse impacts on human health, animal life, wildlife, and the environment from the proposed discharge and spills at the proposed facility.

The ED recommends finding that Herb Flanagan’s Request substantially complied with 30 TAC §§ 55.201(c) and 55.201(d).

2. **Lanell Flanagan** filed a timely, written Request that provided the requisite contact information, raised relevant and material issues that form the basis of her Request in timely comments not withdrawn before the RTC was filed, and requested a hearing.

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<sup>7</sup> 30 TAC § 50.115(b).

<sup>8</sup> *Id.* at § 55.203(d).



Ms. Flanagan's Request complied with 30 TAC §§ 55.201(c), and (d) because it effectively identified a personal justiciable interest in a written explanation plainly describing why Ms. Flanagan believes she will be affected by the application differently than the public. Ms. Flanagan's Request stated she lives in proximity to the proposed facility and raised issues relevant to a decision on the application, such as adverse impacts on human health, animal life, wildlife, and the environment from the proposed discharge and spills at the proposed facility.

The ED recommends finding that Lanell Flanagan's Request substantially complied with 30 TAC §§ 55.201(c) and 55.201(d).

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

Mr. Richards' Request complied with 30 TAC §§ 55.201(c), and (d) because it effectively identified a personal justiciable interest in a written explanation plainly describing why Mr. Richards believes he will be affected by the application differently than the public. Mr. Richards' Request stated he and his family live in proximity to the proposed facility and raised issues relevant to a decision on the application, such as negative odors and impacts to human health, animal life, and wildlife from the proposed discharge and facility.

The ED recommends finding that Bret Richards' Request substantially complied with 30 TAC §§ 55.201(c) and 55.201(d).

4. **Jean Ragusa** filed a timely, written Request that provided the requisite contact information, raised relevant and material issues that form the basis of her Request in timely comments not withdrawn before the RTC was filed, and requested a hearing.

Ms. Ragusa's Request complied with 30 TAC §§ 55.201(c), and (d) because it effectively identified a personal justiciable interest in a written explanation plainly describing why Ms. Ragusa believes she will be affected by the application differently than the public. Ms. Ragusa's Request stated she and her family live in proximity to the proposed facility and raised issues relevant to a decision on the application, such as negative odors and impacts to human health, animal life, and wildlife from the proposed discharge and facility.

The ED recommends finding that Jean Ragusa's Request substantially complied with 30 TAC §§ 55.201(c) and 55.201(d).

5. **Melisa Wagner** filed a timely, written Request that provided the requisite contact information, raised relevant and material issues that form the basis of her Request in timely comments not withdrawn before the RTC was filed, and requested a hearing.

Ms. Wagner's Request complied with 30 TAC §§ 55.201(c), and (d) because it effectively identified a personal justiciable interest in a written explanation plainly describing why Ms. Wagner believes she will be affected by the application differently than the public. Ms. Wagner's Request stated she and her family live in proximity to the proposed facility and raised issues relevant to a decision on the

application, such as negative odors and impacts to human health, animal life, and wildlife from the proposed discharge and facility.

The ED recommends finding that Melisa Wagner's Request substantially complied with 30 TAC §§ 55.201(c) and 55.201(d).

6. **Cynthia Werner** filed a timely, written Request that provided the requisite contact information, raised relevant and material issues that form the basis of her Request in timely comments not withdrawn before the RTC was filed, and requested a hearing.

Ms. Werner's Request complied with 30 TAC §§ 55.201(c), and (d) because it effectively identified a personal justiciable interest in a written explanation plainly describing why Ms. Werner believes she will be affected by the application differently than the public. Ms. Werner's Request stated she and her family live in proximity to the proposed facility and raised issues relevant to a decision on the application, such as negative odors and impacts to human health, animal life, and wildlife from the proposed discharge and facility.

The ED recommends finding that Cynthia Werner's Request substantially complied with 30 TAC §§ 55.201(c) and 55.201(d).

7. **Shana Elliot** filed a timely, written Request that provided the requisite contact information and requested a Hearing; however, Ms. Elliot's Request failed to raise relevant and material issues from her comments on the application.

Ms. Elliot's Request failed to raise issues that formed the basis of her Request in timely comments not withdrawn before the RTC was filed, because she did not make any relevant or material comments on the application to base her Request on, as required by 30 TAC § 55.201(d)(4)(B), nor did Ms. Elliot's Request raise any relevant or material issues of disputed fact that were based on any timely comments also required by § 55.201(d)(4)(B).

Ms. Elliot's Request also lacked a statement of how and why she believes she will be adversely affected by the proposed facility or discharge in a manner not common to members of the public, as required by 30 TAC § 55.201(d)(2).

The ED recommends finding that Shana Elliot's Request failed to substantially comply with 30 TAC §§ 55.201(c) and 55.201(d).

8. **Jamie Thomas** filed a timely, written Request that provided the requisite contact information and requested a Hearing; however, Ms. Thomas' Request failed to raise relevant and material issues from her comments on the application.

Ms. Thomas' Request failed to raise issues that formed the basis of her Request in timely comments not withdrawn before the RTC was filed, because she did not make any relevant or material comments on the application to base her Request on, as required by 30 TAC § 55.201(d)(4)(B), nor did Ms. Thomas' Request raise any relevant or material issues of disputed fact that were based on any timely comments also required by § 55.201(d)(4)(B).

Ms. Thomas' Request also lacked a statement of how and why she believes she will be adversely affected by the proposed facility or discharge in a manner not common to members of the public, as required by 30 TAC § 55.201(d)(2).

The ED recommends finding that Jamie Thomas' Request failed to substantially comply with 30 TAC §§ 55.201(c) and 55.201(d).

9. **Warren Wall** filed a timely, written Request that provided the requisite contact information and requested a Hearing; however, Ms. Wall's Request failed to raise relevant and material issues from her comments on the application.

Mr. Wall's Request failed to raise issues that formed the basis of his Request in timely comments not withdrawn before the RTC was filed, because he did not make any relevant or material comments on the application to base his Request on, as required by 30 TAC § 55.201(d)(4)(B), nor did Mr. Wall's Request raise any relevant or material issues of disputed fact that were based on any timely comments also required by § 55.201(d)(4)(B).

Mr. Wall's also lacked a statement of how and why he believes he will be adversely affected by the proposed facility or discharge in a manner not common to members of the public, as required by 30 TAC § 55.201(d)(2).

The ED recommends finding that Warren Wall's Request failed to substantially comply with 30 TAC §§ 55.201(c) and 55.201(d).

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

1. **Herb Flanagan** filed a Request that effectively identified a personal, justiciable interest affected by the application.

Mr. Flanagan's Request stated that the proposed facility is in proximity to his home, which according to the GIS map prepared by the ED's staff is only 0.10 linear miles from the proposed facility, which can possibly increase the likelihood that Mr. Flanagan will be affected in a way not common to the public.

Mr. Flanagan's proximity, which was explained briefly and specifically, in plain language in his Request, and the relevant issues to a decision on the application that he raised, adverse impacts to human health, animal life, wildlife, and the environment from the proposed discharge and spills at the proposed facility, are issues related to the interests of the requester, demonstrating a reasonable relationship exists between the interests claimed and the activity regulated, which also increases the likelihood that Mr. Flanagan may be affected in a way not common to the public.

The ED recommends that the Commission find that Herb Flanagan is an Affected Persons under 30 TAC § 55.203.

2. **Lanell Flanagan** filed a Request that effectively identified a personal, justiciable interest affected by the application.

Ms. Flanagan's Request stated that the proposed facility is in proximity to her home, which according to the GIS map prepared by the ED's staff is only 0.10 linear miles from the proposed facility, which can possibly increase the likelihood that Ms. Flanagan will be affected in a way not common to the public.

Ms. Flanagan's proximity, which was explained briefly and specifically, in plain language in her Request, and the relevant issues to a decision on the application that she raised, adverse impacts to human health, animal life, wildlife, and the environment from the proposed discharge and spills at the proposed facility, are

issues related to the interests of the requester, demonstrating a reasonable relationship exists between the interests claimed and the activity regulated, which also increases the likelihood that Ms. Flanagan may be affected in a way not common to the public.

The ED recommends that the Commission find that Lanell Flanagan is an Affected Persons under 30 TAC § 55.203.

3. **Bret Richards** filed a Request that effectively identified a personal, justiciable interest affected by the application.

Mr. Richards' Request stated that the proposed facility is in proximity to his home, which according to the GIS map prepared by the ED's staff is only 0.87 linear miles from the proposed facility, which can possibly increase the likelihood that Mr. Richards will be affected in a way not common to the public.

Mr. Richards' proximity, which was explained briefly and specifically, in plain language in his Request, and the relevant issues to a decision on the application that he raised, negative odors and impacts to human health, animal life, and wildlife from the proposed discharge and facility, are issues related to the interests of the requester, demonstrating a reasonable relationship exists between the interests claimed and the activity regulated, which also increases the likelihood that Mr. Richards may be affected in a way not common to the public.

The ED recommends that the Commission find that Bret Richards is an Affected Persons under 30 TAC § 55.203.

4. **Jean Ragusa** filed a Request that effectively identified a personal, justiciable interest affected by the application.

Ms. Ragusa's Request stated that the proposed facility is in proximity to her home, which according to the GIS map prepared by the ED's staff is only 1.02 linear miles from the proposed facility, which can possibly increase the likelihood that Ms. Ragusa will be affected in a way not common to the public.

Ms. Ragusa's proximity, which was explained briefly and specifically, in plain language in her Request, and the relevant issues to a decision on the application that she raised, negative odors and impacts to human health, animal life, and wildlife from the proposed discharge and facility, are issues related to the interests of the requester, demonstrating a reasonable relationship exists between the interests claimed and the activity regulated, which also increases the likelihood that Mr. Richards may be affected in a way not common to the public.

The ED recommends that the Commission find that Jean Ragusa is an Affected Persons under 30 TAC § 55.203.

5. **Melisa Wagner** filed a Request that effectively identified a personal, justiciable interest affected by the application.

Ms. Wagner's Request stated that the proposed facility is in proximity to her home, which according to the GIS map prepared by the ED's staff is only 1.31 linear miles from the proposed facility, which can possibly increase the likelihood that Ms. Wagner will be affected in a way not common to the public.

Ms. Wagner's proximity, which was explained briefly and specifically, in plain language in her Request, and the relevant issues to a decision on the application

that she raised, negative odors and impacts to human health, animal life, and wildlife from the proposed discharge and facility, are issues related to the interests of the requester, demonstrating a reasonable relationship exists between the interests claimed and the activity regulated, which also increases the likelihood that Ms. Wagner may be affected in a way not common to the public.

The ED recommends that the Commission find Melisa Wagner is an Affected Persons under 30 TAC § 55.203.

6. **Cynthia Werner** filed a Request that effectively identified a personal, justiciable interest affected by the application.

Ms. Werner's Request stated that the proposed facility is in proximity to her home, which according to the GIS map prepared by the ED's staff is only 1.44 linear miles from the proposed facility, which can possibly increase the likelihood that Ms. Werner will be affected in a way not common to the public.

Ms. Werner's proximity, which was explained briefly and specifically, in plain language in her Request, and the relevant issues to a decision on the application that she raised, negative odors and impacts to human health, animal life, and wildlife from the proposed discharge and facility, are issues related to the interests of the requester, demonstrating a reasonable relationship exists between the interests claimed and the activity regulated, which also increases the likelihood that Ms. Werner may be affected in a way not common to the public.

The ED recommends that the Commission find that Cynthia Werner is an Affected Persons under 30 TAC § 55.203.

7. **Shana Elliot** filed a Request that failed to identify a personal, justiciable interest affected by the application, describing in plain language in a brief, written statement of how and why Ms. Elliot believes she will be adversely affected by the proposed facility in a manner not common to members of the public.

Though the GIS map prepared by the ED's staff locates Ms. Elliot's location property 1.44 linear miles from the proposed facility, Ms. Elliot's Request did not raise any relevant issues, nor explain why she believes she will be adversely affected by this application in a manner not common to members of the public. Lacking that necessary explanation and failing to raise any relevant issues for the Commission to consider, Ms. Elliot's Request failed to demonstrate a reasonable relationship between the interests claimed and the activity regulated, which decreases the likelihood that Ms. Elliot may be affected in a way not common to the public.

The ED recommends that the Commission find that Shana Elliot is not an Affected Person under 30 TAC § 55.203.

8. **Jamie Thomas** filed a Request that failed to identify a personal, justiciable interest affected by the application, describing in plain language in a brief, written statement of how and why Ms. Thomas believes she will be adversely affected by the proposed facility in a manner not common to members of the public.

Though the GIS map prepared by the ED's staff locates Ms. Thomas' location property 0.98 linear miles from the proposed facility, Ms. Thomas' Request did not raise any relevant issues, nor explain why she believes she will be adversely affected by this application in a manner not common to members of the public.

Lacking that necessary explanation and failing to raise any relevant issues for the Commission to consider, Ms. Thomas' Request failed to demonstrate a reasonable relationship between the interests claimed and the activity regulated, which decreases the likelihood that Ms. Thomas may be affected in a way not common to the public.

The ED recommends that the Commission find that Jamie Thomas is not an Affected Person under 30 TAC § 55.203.

9. **Warren Wall** filed a Request that failed to identify a personal, justiciable interest affected by the application, describing in plain language in a brief, written statement of how and why Mr. Wall believes he will be adversely affected by the proposed facility in a manner not common to members of the public.

Though the GIS map prepared by the ED's staff locates Mr. Wall's location 1.28 linear miles from the proposed facility, Mr. Wall's Request did not raise any relevant issues, nor explain why he believes he will be adversely affected by this application in a manner not common to members of the public. Lacking that necessary explanation and failing to raise any relevant issues for the Commission to consider, Mr. Wall's Request failed to demonstrate a reasonable relationship between the interests claimed and the activity regulated, which decreases the likelihood that Mr. Wall may be affected in a way not common to the public.

The ED recommends that the Commission find that Warren Wall is not an Affected Person under 30 TAC § 55.203.

#### VIII. ISSUES RAISED IN THE HEARING REQUEST:

The Requests of Herb Flanagan, Lanell Flanagan, Bret Richards, Jean Ragusa, Melisa Wagner, and Cynthia Werner raised the following issues of whether:

1. **The draft permit contains adequate protections for human health and the environment consistent with the TCEQ's rules, including the TSWQS.**

(RTC Response No. 2) This is an issue of fact. If it can be shown that the draft permit does not have adequate protections for human health and the environment consistent with the TCEQ's rules, including the TSWQS, that information would be relevant and material to a decision on the application.

The ED concludes this issue is relevant and material, and if this case is referred to SOAH, the ED recommends the Commission refer this issue.

2. **The draft permit has adequate provisions to control odors from the proposed facility in accordance with applicable TCEQ rules.**

(RTC Response No. 4) This is an issue of fact. If it can be shown that the draft permit does not have adequate provisions to control odors, that information would be relevant and material to a decision on the application.

The ED concludes this issue is relevant and material, and if this case is referred to SOAH, the ED recommends the Commission refer this issue.

## IX. CONTESTED CASE HEARING DURATION

If the Commission grants a hearing on this application, the ED recommends that the duration of the hearing be 180 days from the preliminary hearing to the presentation of a proposal for decision to the Commission.

## X. REQUESTS FOR RECONSIDERATION

Sergey Bitenko, Gordon Wilson, Paul Wagner, and Michelle Moore all filed timely Requests for Reconsideration (RFR), however, all the RFRs failed to raise any new information for the ED to analyze. Therefore, the ED recommends denying all RFRs.

## XI. EXECUTIVE DIRECTOR'S RECOMMENDATION

The ED recommends the following actions by the Commission:

1. Find that Herb Flanagan, Lanell Flanagan, Bret Richards, Jean Ragusa, Melisa Wagner, and Cynthia Werner are affected persons under 30 TAC §§ 55.203.
2. Grant the Requests of Herb Flanagan, Lanell Flanagan, Bret Richards, Jean Ragusa, Melisa Wagner, and Cynthia Werner and deny all others.
3. Deny all the RFRs filed on the application.
4. Should the Commission decide to refer this case to SOAH;
  - a. refer the case to Alternative Dispute Resolution for a reasonable time.
  - b. refer the identified issues in section VII. 1.- 2. to SOAH for a Hearing

Respectfully submitted,

Texas Commission on Environmental Quality

Kelly Keel Linden, *Interim Executive Director*

Erin Chancellor, *Director*  
Office of Legal Services

Charmaine Backens, *Deputy Director*  
Environmental Law Division,



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Michael T. Parr II, Staff Attorney  
Environmental Law Division  
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Telephone No. 512-239 0611  
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REPRESENTING THE EXECUTIVE DIRECTOR  
OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

XII. CERTIFICATE OF SERVICE

I certify that on September 1, 2023, the Executive Director's Response to Hearing Requests for TPDES Permit No. WQ0016077001 was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk, and a copy was served to all persons listed on the attached mailing list via hand delivery, electronic delivery, inter-agency mail, or by deposit in the U.S. Mail.



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



# Attachment A

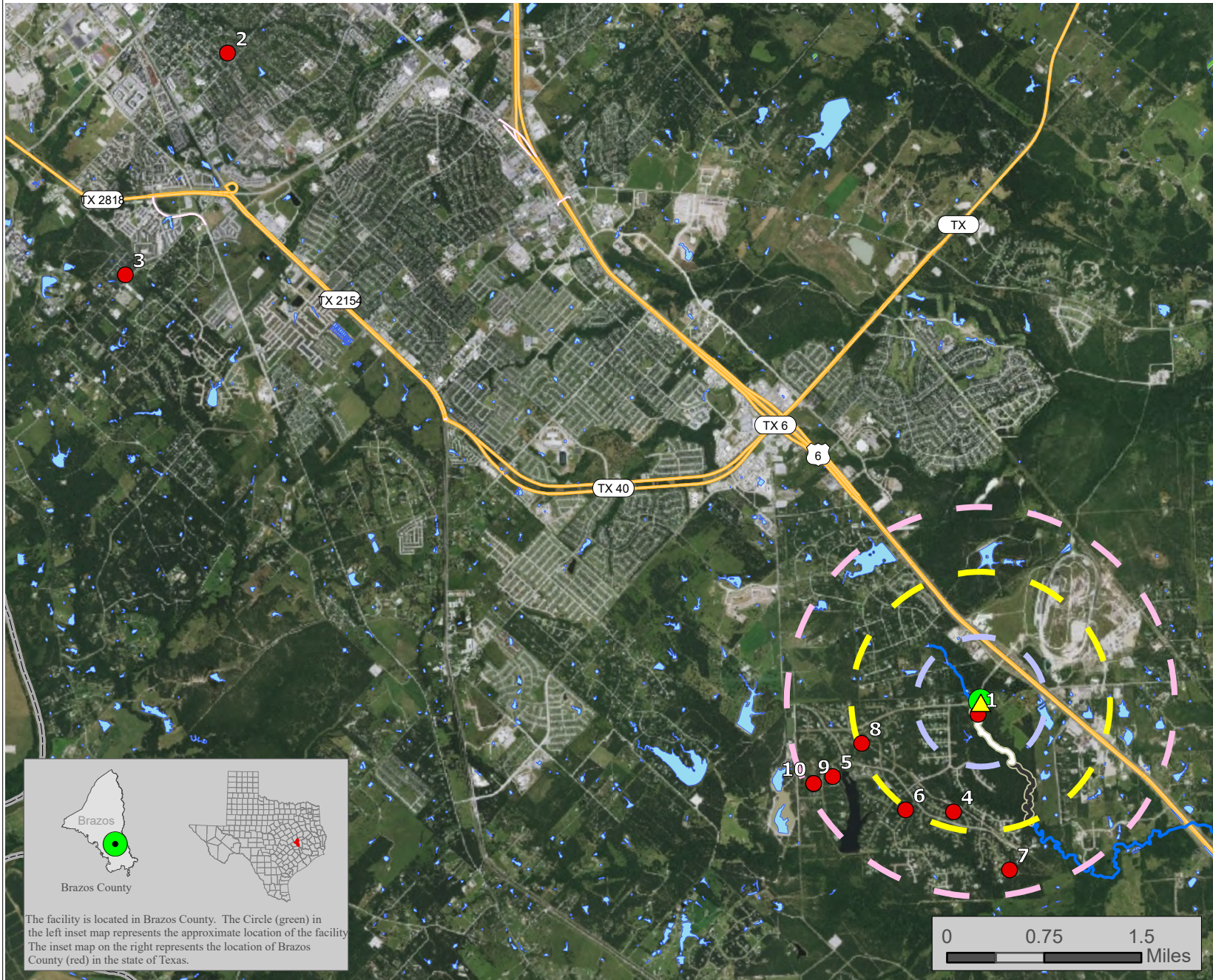
# Smiling Mallard Development, Ltd. GIS Map



*Protecting Texas by  
Reducing and  
Preventing Pollution*

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

Texas Commission on Environmental Quality  
GIS Team (Mail Code 197)  
P.O. Box 13087  
Austin, Texas 78711-3087  
Date: 6/20/2023  
CRF 0089733  
Cartographer: Abanda



- Proposed Facility
- ▲ Outfall Permit Number 16077-001
- Requestors
- 0.5-Mile Radius from Proposed Facility
- 1.0-Mile Radius from Proposed Facility
- 1.5-Mile Radius from Proposed Facility
- Discharge Route 0.00 to 0.75 Miles
- Discharge Route 0.75 to 1.50 Miles
- NHD Flowline including Discharge Route
- Major Roads**
- Highway
- Intermediate Roads
- County Boundary

Distances, in miles, between the Requestors and the Proposed Facility point are located in Appendix A.

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

The facility is located in Brazos County. The Circle (green) in the left inset map represents the approximate location of the facility. The inset map on the right represents the location of Brazos County (red) in the state of Texas.

### Appendix A - Distance (miles) Between Requestor and Facility Point

Label	Distance (mi)	Name	Address	City	State	ZIP	Latitude	Longitude
1	0.10	Lanell Flanagan	1881 Narrow Way	College Station	TX	77845	30.5257	-96.2333
2	7.67	Lanell Flanagan	1006 S Dexter Drive	College Station	TX	77840-6123	30.6024	-96.3277
3	7.38	Herb Flanagan	10996 Woodlands Dr	College Station	TX	77845-9124	30.578	-96.3419
4	0.87	Bret Richards	18339 Copper River Dr	College Station	TX	77845-4667	30.5149	-96.2369
5	1.28	Warren Wall	3384 Arapaho Ridge Rd	College Station	TX	77845-4539	30.5193	-96.2524
6	1.02	Jean Ragusa	3473 Toltec Trail	College Station	TX	77845-4539	30.5153	-96.2431
7	1.31	Melissa Wagner	19059 Tallulah Trail	College Station	TX	77845-8647	30.5082	-96.2299
8	0.98	Jamie Thomas	3645 ShoShoni Court	College Station	TX	77845-4588	30.5229	-96.2485
9	1.44	Shana Elliot*	3337 Arapaho Ridge Rd	College Station	TX	77845-4540	30.5186	-96.2549
10	1.44	Cynthia Werner*	3337 Arapaho Ridge Rd	College Station	TX	77845-4540	30.5186	-96.2549



MAILING LIST

Smiling Mallard Development, Ltd.

TCEQ Docket No. 2023-0863-MWD; TPDES Permit No. WQ0016077001

FOR THE APPLICANT:

Travis Martinek, Project Manager  
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3608 East 29th Street, Suite 100  
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George Neill, P.E., Project Engineer  
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FOR THE EXECUTIVE DIRECTOR

via electronic mail:

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FOR THE CHIEF CLERK

via eFilings:

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Texas Commission on Environmental  
Quality  
Office of Chief Clerk, MC-105  
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REQUESTER(S)/INTERESTED PERSON(S):

See attached list.

REQUESTER(S)

Sergiy Butenko  
3421 Mojave Canyon Dr  
College Station, TX 77845-4660

Shana Elliott  
3337 Arapaho Ridge Dr  
College Station, TX 77845-4540

Herb Flanagan  
10996 Woodlands Dr  
College Station, TX 77845-9124

Herb Flanagan  
1881 Narrow Way  
College Station, TX 77845-8746

Herb Flanagan  
Moore Supply Company  
1530 Harvey Mitchell Pkwy S  
College Station, TX 77840-6209

Michele Moore  
3718 Maricopa Ln  
College Station, TX 77845-2009

Jean Ragusa  
3473 Toltec Trl  
College Station, TX 77845-3543

Bret Richards  
18339 Copper River Dr  
College Station, TX 77845-4667

Jamie Thomas  
3645 Shoshoni Ct  
College Station, TX 77845-4588

Melisa Wagner  
19059 Tallulah Trl  
College Station, TX 77845-8647

Paul Wagner  
19059 Tallulah Trl  
College Station, TX 77845-8647

Warren Edward Wall  
3384 Arapaho Ridge Dr  
College Station, TX 77845-4539

Cynthia Werner  
3385 Arapaho Ridge Dr  
College Station, TX 77845-4540

Gordon Wilson  
17313 Cheveyo Cv  
College Station, TX 77845-7461

PUBLIC OFFICIALS - INTERESTED PERSON(S)

The Honorable Kyle Kacal  
State Representative, Texas House of Representatives District 12  
PO Box 2910  
Austin, TX 78768-2910

The Honorable Charles Schwertner  
State Senator, The Senate of Texas  
District 5 PO Box 12068  
Austin, TX 78711-2068

INTERESTED PERSON(S)

Gamal Akabani  
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Daniel Applegate  
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Lindsey Bolline  
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Xenia Butenko  
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Jean Coatney  
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College Station, TX 77845-3532

Janet Estill Galindo  
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Tasha Homann  
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Neetu Kainthla  
3545 Kanati Cv  
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Sairoj Maknojia  
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Stacy Muehlbrad  
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