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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

January 12, 2024

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

RE: **IN THE MATTER OF THE APPLICATION BY MACEDONIA ASSET  
LLC FOR TPDES PERMIT NO. WQ0016182001  
TCEQ DOCKET NO. 2023-1565-MWD**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Josiah Mercer".

Josiah T. Mercer, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-1565-MWD

APPLICATION BY MACEDONIA	§	BEFORE THE
ASSET LLC FOR NEW TPDES	§	TEXAS COMMISSION ON
PERMIT NO. WQ0016182001	§	ENVIRONMENTAL QUALITY

**OFFICE OF PUBLIC INTEREST COUNSEL'S  
RESPONSE TO REQUESTS FOR HEARING**

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

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

**I. Introduction**

**A. Summary of Position**

Before the Commission is an application by Macedonia Asset LLC (Applicant or Macedonia Asset) for Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016182001 (the Application). OPIC notes that the TCEQ Chief Clerk's office received timely hearing requests from 9 individuals. For the reasons stated herein, OPIC respectfully recommends the Commission grant the requests of Carolle Gallien, Melanie Metcalfe, Vanessa Thornhill, Guy McDonald, Rebecca Portillo, and Barbara Hamala, and refer this Application for a 180-day hearing at the State Office of Administrative Hearings (SOAH) on Issue nos. 1-4 contained in §III.B.

## **B. Description of Application and Facility**

Macedonia Asset applied to the TCEQ for new TPDES Permit No. WQ0016182001. If issued, the permit would authorize discharge of treated domestic wastewater from the proposed Woodside Manor wastewater treatment facility (the Facility) at a daily average flow not to exceed 80,000 gallons per day. The Facility would be an activated sludge process plant operated in the conventional mode. Treatment units would include a bar screen, an anoxic-selector zone, two aeration basins, one final clarifier, two sludge digesters, and a chlorine contact chamber. No other chemical treatment is indicated in the Application. The permit allows a maximum total chlorine residual of 4.0 milligrams per liter to be monitored five times per week by grab sample.

The Facility would be located in Waller County at 24895 Macedonia Road, Hockley. The treated effluent would be discharged to Threemile Creek, then to Brushy Creek, and then to Spring Creek in Segment No. 1008 of the San Jacinto River Basin. The unclassified receiving water use is high aquatic life use for Threemile Creek and Brushy Creek. The designated uses for Segment No. 1008 are primary contact recreation, public water supply, and high aquatic life use. In accordance with 30 Texas Administrative Code (TAC) § 307.5, the Executive Director (ED) performed an initial antidegradation review of the receiving waters. The ED's Tier 1 antidegradation review preliminarily determined that existing water quality uses would not be impaired by this permit action. The ED's Tier 2 review preliminarily determined that no significant degradation of water quality

would be expected in Threemile Creek and Brushy Creek, which have been identified as having high aquatic life uses.

### **C. Procedural Background**

The TCEQ received the Application on June 22, 2022, and declared it administratively complete on July 20, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published in *The Waller Times* on July 27, 2022. The ED completed the technical review of the Application on August 31, 2022. The Applicant published the Notice of Application and Preliminary Decision in *The Waller Times* on October 12, 2022. The public comment period for this Application ended on November 11, 2022. The Chief Clerk mailed the ED's Decision and Response to Public Comment on September 11, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was October 11, 2023. The TCEQ Chief Clerk's office received timely hearing requests from 9 individuals and no requests for reconsideration.

## **II. Applicable Law**

This Application was filed on or after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709.<sup>1</sup> Under Title 30, Texas Administrative Code (TAC) § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for

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<sup>1</sup> Tex. S.B. 709, 84th Leg., R.S. (2015).

applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and
- (5) provide any other information specified in the public notice of application.<sup>2</sup>

Under 30 TAC § 55.203(a), an "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. Relevant factors to be considered in determining whether a person is affected include:

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<sup>2</sup> 30 TAC § 55.201(d).

- (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>3</sup>

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

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the executive director; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.<sup>4</sup>

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission must grant a hearing request made by an affected person if the request raises disputed issues of fact that were raised by

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<sup>3</sup> 30 TAC § 55.203(c).

<sup>4</sup> 30 TAC § 55.203(d).

the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and, that are relevant and material to the Commission's decision on the application.

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

### **III. Analysis of Hearing Requests**

#### **A. Whether the Requestors are Affected Persons**

##### Requestors Located Less than 1 Mile from the Proposed Facility

The Commission received timely hearing requests and comments from two requestors who are located at distances within one mile of the proposed Facility: Carolle Gallien (0.16 miles) and Melanie Metcalfe (0.74 miles). These requestors raise various concerns—including the appropriateness of the proposed discharge route, the creation of nuisance odors, and the potential negative effect on local wildlife and ecosystems.

To be granted a contested case hearing, the requestors must show that they qualify as “affected persons”—which are those who have personal justiciable interests related to a legal right, duty, privilege, power, or economic interest affected by the application—and must distinguish those interests from interests common to the general public.<sup>5</sup> Ms. Gallien's concerns about the discharge route, nuisance odor, and the effect on local ecosystems as well as Ms.

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<sup>5</sup> See 30 TAC § 55.203(a).

Metcalfe’s concerns about the Facility’s effect on wildlife—including the song birds, mourning doves, and whitetail deer that she sees on and near her property—are interests which are protected by the law under which this Application will be considered.<sup>6</sup> Further, as these requestors’ properties are near the proposed Facility, a reasonable relationship exists between the interests expressed in their comments and the Applicant’s regulated activity—a relevant factor under 30 TAC § 55.201(c)(3).

These requestors’ proximity—in combination with their stated interests—demonstrates that they are likely to be affected in a way not common to members of the general public. Therefore, OPIC concludes that Carolle Gallien and Melanie Metcalfe have demonstrated that they possess a personal justiciable interest in this matter and qualify as affected persons.

#### Requestors Located Between 1 and 2 Miles from the Proposed Facility

The agency has acknowledged timely requests and comments from the following requestors who are located at distances greater than one mile but less than two miles from the proposed Facility: Vanessa Thornhill (1.13 miles), Guy McDonald (1.47 miles), and Rebecca Portillo (1.54 miles).<sup>7</sup> Additionally, Barbara Hamala (~1.25 miles) submitted timely comments in which she asked, “[h]ow soon can a public hearing be held.” Because Ms. Hamala’s comments represent a desire that a hearing be held, OPIC finds that this comment qualifies as a timely request for a contested case hearing. These requestors raise a number of varied

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<sup>6</sup> See 30 TAC § 55.203(c)(1).

<sup>7</sup> Robin McDonald also lives within this area. Her hearing request is handled in the next section.

concerns—including the appropriateness of the discharge route, the potential effect on water quality and the local aquifer, and the impact on area wildlife and ecosystems. These concerns are interests which are protected by the law under which this Application will be considered.<sup>8</sup> Further, a reasonable relationship exists between those interests and the Applicant’s regulated activity.<sup>9</sup>

Based on Vanessa Thornhill’s proximity to the Facility and Threemile Creek as well as her concerns about local wildlife and water quality, OPIC finds that she has demonstrated that there is a reasonable likelihood that she could be affected in a way not common to members of the general public. Guy McDonald lives directly along—and Rebecca Portillo lives very close to—the discharge route, both between a mile and a mile and a half downstream from the discharge point. They both raise relevant and material concerns—that the proposed discharge would affect the flow rate and water quality of the discharge route that is close to their properties, and that this would disturb wildlife along the discharge route, the local aquifer, and area ecosystems more broadly. In her comments, Barbara Hamala provided an address that is directly along the discharge route—less than half a mile downstream of the discharge point. She raises concerns about the appropriateness of the discharge route.

For these reasons, OPIC finds that these requestors have demonstrated that there is a reasonable likelihood that they could be affected by the Applicant’s regulated activity in a way not common to members of the general public. OPIC

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<sup>8</sup> See 30 TAC § 55.203(c)(1).

<sup>9</sup> See 30 TAC § 55.201(c)(3).

notes that there are no explicit distance restrictions imposed by law in this matter.<sup>10</sup> Therefore, OPIC concludes that Vanessa Thornhill, Guy McDonald, Rebecca Portillo, and Barbara Hamala qualify as affected persons.

#### Robin McDonald

The Commission also received a timely comment and hearing request from Robin McDonald (1.47 miles). However, Robin McDonald only raises one concern in her comments—related to whether a proper environmental impact study (EIS) has been performed. No EIS is required as part of the TPDES permitting process, and the lack of an EIS is insufficient to show that Ms. McDonald could be personally affected in a manner not common to the general public. Because she raises no other issues in her comments, Ms. McDonald fails to assert a personal justiciable interest, and OPIC cannot find that she is an affected person.

#### Requestors Located At Distances Greater than 2 Miles from the Proposed Facility

The Commission received timely requests and comments from two other requestors: Rhonda Jordan (2.21 miles) and Steve Cramer (16.69 miles). These requestors are located at distances greater than two miles from the proposed Facility and neither are along the discharge route. OPIC notes that there are no specific distance limitations applicable to whom may be considered an affected person for purposes of this Application.<sup>11</sup> However—at distances over two miles and with no proximity to the discharge route, OPIC finds that these requestors have not established a reasonable relationship between their claimed interests

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<sup>10</sup> See 30 TAC § 55.201(c)(2).

<sup>11</sup> See 30 TAC § 55.203(c)(3).

and the regulated activity.<sup>12</sup> Given the nature and volume of the proposed discharge to be permitted and considering these requestors' distances from the proposed Facility, discharge route, and regulated activity—OPIC cannot find that Rhonda Jordan and Steve Cramer are affected persons.

**B. Which Issues Raised in the Hearing Requests are Disputed**

The affected persons discussed above raised the following issues:

1. Whether the discharge route will function properly as an operational feature of the proposed Facility.  
(Raised by: Carolle Gallien, Vanessa Thornhill, Barbara Hamala, Guy McDonald, and Rebecca Portillo)
2. Whether the Facility and draft permit will adversely affect water quality in the area and in the local aquifer.  
(Raised by: Vanessa Thornhill, Guy McDonald, and Rebecca Portillo)
3. Whether the Facility and draft permit are adequately protective of area wildlife, ecosystems, and agriculture.  
(Raised by: Carolle Gallien, Melanie Metcalf, Vanessa Thornhill, Guy McDonald, and Rebecca Portillo)
4. Whether the Facility and draft permit will create nuisance odors.  
(Raised by: Carolle Gallien and Rebecca Portillo)
5. Whether the proposed Facility will cause increased traffic.  
(Raised by the following affected persons: Carolle Gallien)

**C. Whether the Dispute Involves Questions of Fact or of Law**

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. The issues raised here are issues of fact.

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

**D. Whether the Issues were Raised During the Public Comment Period**

All issues were specifically raised by requestors who qualify as affected persons during the public comment period.

**E. Whether the Hearing Requests are Based on Issues Raised Solely in a Withdrawn Public Comment**

No public comments were withdrawn in this matter. Therefore, the hearing requests are not based on issues raised in withdrawn comments.

**F. Whether the Issues are Relevant and Material to the Decision on the Application**

The affected persons' hearing requests raise issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii) as well as other issues that are not relevant and material. To refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. Relevant and material issues are those governed by the substantive law under which this permit is to be issued.<sup>13</sup>

Suitability of the Discharge Route

The affected persons in this matter are concerned that the proposed discharge route has been improperly characterized in the Application and will not function properly. They claim that the creek is often dry and that the proposed discharge would substantially change the creek's flow rates. This concern appears to be based on the suitability and functioning of the discharge route. Proper functioning of a discharge route as an operational feature of a

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<sup>13</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

wastewater treatment plant may be addressed under 30 TAC § 309.12. Therefore, Issue no. 1 is relevant and material to the Commission's decision regarding this Application and is appropriate for referral to SOAH.

Water Quality, Human Health, Wildlife, and Agriculture

The affected persons in this matter are concerned with adverse effects to water quality and its impacts on human health, local wildlife and ecosystems, and agriculture. They opine that the proposed Facility will substantially change the water quality and flow rates of the proposed discharge route, leading to negative impacts on human health, agriculture, and the ecosystems that exist along the discharge route.

The Commission is responsible for the protection of water quality under Texas Water Code (TWC) Chapter 26 and 30 TAC Chapter 307. The Texas Surface Water Quality Standards (Standards) in Chapter 307 require that the proposed permit “maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and economic development of the state.”<sup>14</sup> According to § 307.6(b)(4) of the Standards, “Water in the state must be maintained to preclude adverse toxic effects on aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three.” Additionally, “[s]urface waters must not be toxic to man from ingestion of water, consumption

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<sup>14</sup> 30 TAC § 307.1.

of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life.”<sup>15</sup> Therefore, Issue nos. 2 and 3 are relevant and material to the Commission’s decision regarding this Application and are appropriate for referral to SOAH.

#### Nuisance Odor

The affected persons in this matter are concerned that the proposed Facility will cause nuisance odor conditions. Odor is specifically addressed by 30 TAC § 309.13(e), which requires that nuisance odor be abated and controlled. Further, § 307.4 delineates general criteria that surface waters must meet, including aesthetic parameters which work, in part, to prevent nuisance conditions attributable to the proposed Facility. Finally, one of the purposes of Chapter 309 is “to minimize the possibility of exposing the public to nuisance conditions.”<sup>16</sup> Therefore, Issue no. 4 is relevant and material to the Commission’s decision regarding this Application and is appropriate for referral to SOAH.

#### Vehicular Traffic

Finally, the affected persons raised concerns about potential increase in vehicular traffic from the proposed Facility and associated development. The Texas Legislature, which establishes the jurisdiction of TCEQ, has not given the Commission the authority to consider issues related to increased traffic when deciding whether to issue a TPDES permit. Therefore, Issue no. 5 is not relevant and material to the Commission’s decision regarding this Application and is not appropriate for referral to SOAH.

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<sup>15</sup> 30 TAC § 307.4(d).

<sup>16</sup> 30 TAC § 309.10.

### **G. Maximum Expected Duration for the Contested Case Hearing**

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier.<sup>17</sup> To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this Application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

### **V. Conclusion**

For the reasons stated above, OPIC finds that the following individuals qualify as affected persons: Carolle Gallien, Melanie Metcalfe, Vanessa Thornhill, Guy McDonald, Rebecca Portillo, and Barbara Hamala. Therefore, OPIC respectfully recommends that the Commission grant these hearing requests, deny all other hearing requests, and refer this Application for a contested case hearing at SOAH on Issue nos. 1-4 contained in §III.B with a maximum duration of 180 days.

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<sup>17</sup> 30 TAC § 50.115(d)(2).

Respectfully submitted,

Garrett T. Arthur  
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By:     *Josiah Mercer*      
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**CERTIFICATE OF SERVICE**

I hereby certify that January 12, 2024, the original of the Office of Public Interest Counsel's Response to Requests for Hearing and Request for Reconsideration was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.

    *Josiah Mercer*      
Josiah T. Mercer

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TCEQ DOCKET NO. 2023-1565-MWD**

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FOR ALTERNATIVE DISPUTE

RESOLUTION

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REQUESTER(S):

See attached list.

**REQUESTER(S)**

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