

**TCEQ Docket No. 2024-1456-MWD**

<b>APPLICATION FROM CIRCLE S</b>	<b>§</b>	<b>BEFORE THE TEXAS</b>
<b>MIDLOTHIAN, LLC FOR TEXAS</b>	<b>§</b>	<b>COMMISSION ON</b>
<b>POLLUTANT DISCHARGE</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>ELIMINATION SYSTEM PERMIT NO.</b>	<b>§</b>	
<b>WQ0016243001</b>	<b>§</b>	

**APPLICANT’S RESPONSE TO HEARING REQUESTS**

Circle S Midlothian (“Applicant”) files this Response to Hearing Requests in the above-referenced matter and respectfully shows the following.

**I. Introduction**

The Office of the Chief Clerk identified timely filed requests for a contested case hearing from the following individuals: Hayden Farrell, Maliya Farrell, Phillip Farrell Jr., Phillip Farrell Sr., Robyn Farrell, Gabriel Griffin, Jacob Griffin, Nick Griffin, Rene Griffin, Ron Kasowski, Carolyn Taylor, Kim Vanderveen. The Chief Clerk further identified two timely filed hearing requests from Ellis County (the “County”). For the reasons stated herein, the Texas Commission on Environmental Quality (the “Commission”) should deny the hearing requests of all requestors and grant the permit as drafted by the Executive Director.

**II. Background**

On October 26, 2022, the Applicant filed with the Commission an application for new Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0016243001 (“Application”), which if issued would authorize Applicant to discharge treated domestic wastewater from a new wastewater treatment facility—the Circle S Subdivisions wastewater treatment plant (“WWTP”). Under the terms of the proposed permit, the daily average flow for the WWTP shall not exceed 0.125 million gallons per day (“MGD”) in the Interim I phase, a daily average flow not to exceed 0.25 MGD in the Interim II phase, and a daily average flow not to

exceed 0.95 MGD in the Final phase. The WWTP will be located approximately one mile northeast of the intersection of Murr Road and Farm-to-Market Road 157, in Ellis County, Texas 76084.

On December 7, 2022 the Commission declared the application administratively complete. Notice of Receipt of Application and Intent to Obtain Water Quality Permit (NORI) was published on December 11, 2022, in the *Waxahachie Daily Light*. The Executive Director completed the technical review of the application on February 1, 2023, and prepared a draft permit. The Notice of Application and Preliminary Decision (NAPD) was published on November 2, 2023, in the *Midlothian Mirror*.

A public meeting was held at the Venus Civic Center, 210 S. Walnut Street, Venus, Texas 76084. on March 4, 2024. The public comment period ended on March 4, 2024, at the close of the public meeting. Based on the information submitted in the hearing requests and a review of the information available in the Chief Clerk's file on this application, Applicant respectfully requests that the Hearing Requests of Hayden Farrell, Maliya Farrell, Phillip Farrell Jr., Phillip Farrell Sr., Robyn Farrell, Gabriel Griffin, Jacob Griffin, Nick Griffin, Rene Griffin, Ron Kasowski, Carolyn Taylor, Kim Vanderveen and the County be denied.

### **III. Review Standard for Requests for Hearing**

#### **A. Applicable Law**

The application was filed after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under Title 30 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 issued raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

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

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

#### **B. Affected Person**

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

### **C. Determining Whether a Person is an Affected Person**

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

- (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.

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission shall grant a hearing request made by an affected person if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comments, and that are relevant and material to the Commission's decision on the application. Under § 55.211(c)(2)(B)-(D), the hearing request 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(d).

#### IV. Evaluation of Requests

The Commission received thirteen hearing requests on the Application. Applicant has evaluated each request below and recommends that the Commission deny each request for the following reasons.

Phillip Farrell Sr., Robyn Farrell, Gabriel Griffin, Jacob Griffin, Nick Griffin and Rene Griffin

Phillip Farrell Sr., Robyn Farrell, Gabriel Griffin, Jacob Griffin, Nick Griffin and Rene Griffin (each an “Ozro Requestor”) provided an address at 1308 Ozro Road, Venus TX 76084 being a thirty-eight-acre parcel of land located at that address (the “Ozro Tract”). The Ozro Requestors provided substantively identical hearing requests, claiming affected person status through ownership of the Ozro Tract. Beyond listing the mailing address of the Ozro Tract and generally explaining that the “confluence of Boggy Branch and Armstrong Creek is on our property[,]” the Ozro Requestors did not include any specific description of their location and distance relative to the proposed facility or activity that is the subject of the Application as required by Section 55.201(d).

Based on the Applicants independent investigation, the Ozro Tract appears to be located well over one mile downstream from the proposed discharge point. As such, distance restrictions or other limitations imposed by law on the affected interest argue against granting each Ozro Requestor standing.<sup>1</sup> Historically, the Commission has considered people who own property adjacent to the facility or discharge route within one mile downstream from the discharge point to be affected persons and does not require that notice be mailed to such persons. Because the Ozro Tract is located more than one mile downstream from the discharge point of the proposed WWTP, each Ozro Requestor fails to meet the TCEQ’s standard for determining affected person status,

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<sup>1</sup> See 30 TAC § 55.203(c)(2).

and it is unreasonable to expect that at such a distance the Ozro Requestors would be affected by the facility or the discharge in a manner that is not common to members of the general public. The distance between the Ozro Tract and the discharge point represents a significant disconnect between the interests of each individual and the regulated activity and, as such, each has not demonstrated that he or she has a personal justiciable interest in this matter. Therefore, the requests for hearing submitted by Phillip Farrell Sr., Robyn Farrell, Gabriel Griffin, Jacob Griffin, Nick Griffin and Rene Griffin must be denied.

Hayden Farrell, Maliya Farrell and Phillip Farrell Jr.

Hayden Farrell, Maliya Farrell and Phillip Farrell Jr. (each a “Bearpath Requestor”) provide an address at 1605 Bearpath Way, Gunter TX 75058 (the “Bearpath Property”). This address is located more 80 miles away from the proposed plant location. These hearing requests, each of which is in substantially the same form, claim an interest in the Ozro Tract as a potential heir. Each Bearpath Requestor claims an interest in the property only though a potential future property right as an heir to the Ozro Tract. No evidence has been provided that any of the above-named parties owns a vested interest in the Ozro Tract as of the date the requests for a hearing were made.

As stated above, the Ozro Tract is located more than one mile downstream from the proposed discharge point. As such, distance restrictions or other limitations imposed by law on the affected interest argue against granting the Bearpath Requestors standing under either the Bearpath Property or the Ozro Tract. Even if the Bearpath Requestors demonstrated a legal interest in the Ozro Tract, each request would fail to meet the applicable standards for affectedness, and it is unreasonable to expect that at such a distance from the Ozro Tract or Bearpath Property, they would be affected by the WWTP or the discharge in a manner that is not common to members of

the general public. Therefore, the requests for hearing submitted by Hayden Farrell, Maliya Farrell, and Phillip Farrell Jr. must be denied.

Ron Kasowski

Ron Kasowski provided an address of 113 Parker Ridge Rd, Palmer TX 75152. This address was located approximately thirty miles away from the WWTP site. His entire request consists of a comment that the hearing should be held in Midlothian not Venus. Mr. Kasowski did not meet the requirements of 30 TAC § 55.201(d)(2) identifying a personal justiciable interest affected by the application, his location or distance relative to the proposed facility, or why he believes he will be adversely affected by the proposed WWTP. Additionally, the location of his property fails distance restrictions under 30 TAC § 55.203(c)(2).

Carolyn Taylor

Carolyn Taylor provided an address of 377 Eleven League Road, Ennis TX 75119. This address was located approximately thirty-five miles away from the WWTP site. Ms. Taylor requested a public hearing for the proposed permit and stated that the proposed WWTP causes grave concern for the citizens of Ellis County. Ms. Taylor did not meet the requirements of 30 TAC § 55.201(d)(2) identifying a personal justiciable interest affected by the application outside of a general concern for the Citizens of the County. Additionally, the location of her property fails distance restrictions under 30 TAC § 55.203(c)(2).

Kim Vanderveen

Kim Vanderveen provided an address of 414 Panther Peak Dr., Midlothian TX 76065. This address was located approximately five miles away from the WWTP site. Her entire request consists of a comment that the hearing should be held in Ellis County and in Midlothian. Ms. Vanderveen did not meet the requirements of 30 TAC § 55.201(d)(2) identifying a personal

justiciable interest affected by the application or why she believes she will be adversely affected by the proposed WWTP. Additionally, the location of his property fails distance restrictions under 30 TAC § 55.203(c)(2).

### Ellis County

The County claims that it is an affected person because it has interests related to legal rights, duties, privileges, powers or economic interests affected by the application that are not common to the general public. The County cites its authority over irrelevant functions such as transportation, emergency services, and health and safety as interests that may be affected by the proposed wastewater treatment plants and associated discharge. The County, however, did not provide any evidence or even a reasonable explanation for how the Commission's approval of the Application would affect the County's ability to continue to engage in those activities. The County generally asserts that the Commission's issuance of the proposed permit could negatively affect water quality and impair existing uses within the County. However, the County does not explain with any degree of specificity how or why the effects and impairments it speculates may occur would actually affect the County in a manner not common with members of the general public.

The County also asserts that its statutory authority to inspect public water to assess water quality and to make inspections and investigations of conditions relating to water quality constitute a personal interest unique to the County and not common to the general public. Read together, the TCEQ's affected person rules do not simply require a governmental entity to demonstrate that it has statutory authority over or interest in the issues relevant to the application to demonstrate affectedness. The governmental entity must explain how and why such authority or interest will actually be affected by the proposed regulated activity.<sup>2</sup> Here, the County gives no such

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<sup>2</sup> 30 Tex. Admin. Code § 55.201(d).



explanation. Rather, the County concludes that because it has such authority, it must necessarily be affected. The County does not—and cannot—explain how or why these authorities and interests will be affected if the Commission issues the requested permit because its authorities and interests cannot and will not be affected.

Whether the Commission ultimately grants or denies Applicant’s requested permit, the County’s ability to inspect and investigate property and water quality conditions in Ellis County will be entirely unaffected. If the Applicant constructs the propose facility and discharges at the full permitted capacity, the County will continue to have the exact same authority to inspect public water, assess whether the quality of the water meets water quality standards, and determine whether wastewater dischargers are discharging in compliance with the requirements of a TCEQ-issued permit. The County will continue to have authority to enter property to make inspections and investigations of conditions relating to water quality and the right to bring a civil suit against any person that violates or threatens to violate Chapter 26 of the Texas Water Code or permits issued thereunder. The Commission’s actions in this proceeding will not change any of that.

Moreover, a county’s authority to bring civil suits for water quality violations does not constitute an interest that is not common to members of the general public. The Federal Clean Water Act provides that “*any citizen* may commence a civil action on his own behalf . . . against any person” who is alleged to be in violation of an effluent standard or limitation under the Clean Water Act.<sup>3</sup> The County may have some statutory authority related to water quality in general, but that authority is not—as the County suggests—unique to the County, and it is not an interest affected by the Application.<sup>4</sup>

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<sup>3</sup> 33 U.S.C. § 1365(a) (emphasis added).

<sup>4</sup> See 30 Tex. Admin. Code 55.203(a).

Ellis County has recently engaged in obstructionist tactics intended to delay and frustrate residential and commercial development. While this strategy has proven effective in referring certain special district creation petitions to the State Office of Administrative Hearings, it is the view of the Applicant that the County in this proceeding—and others like it—seeks to abuse the Commission’s process to unnecessarily delay development within its borders or otherwise extort developers of property. The County’s tactics may have proven effective in causing undue delay and unnecessary expense in the Commission’s recent creation of special districts,<sup>5</sup> but applications for wastewater permits involve a much narrower scope of issues that are unlikely to affect any legitimate activity or authority of the County. For the County to have standing as an affected person, there must be a reasonable relationship that exists between the interest claimed and the activity regulated.<sup>6</sup> In contesting the Application, the County has not identified how the proposed permit would negatively impact its ability to serve its general authorities outlined above.

Neither the Texas Water Code nor other applicable statutes give the County standing solely based on its statutory authorities as a county, and the County did not demonstrate how it was an affected person on an individual basis. Although the County is a governmental entity as that term is used in Section 55.203(c)(7), the County has not demonstrated that it has statutory authority over or interest in the issues relevant to this Application, and certainly has not explained how or why such alleged authority or interest will be affected by the Commission’s decision to issue or deny the requested permit. Consequently, Ellis County lacks any personal justiciable interest that is not common to members of the general public.

## **V. Conclusion**

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<sup>5</sup> CITE TCEQ DOCKETS

<sup>6</sup> See 30 Tex. Admin. Code § 55.203(c).

For the reasons discussed above, the hearing requests dispute no relevant questions of fact. The draft permit meets the requirements of applicable law. The concerns raised in public comments have been addressed in the permit as well as the public meeting that was held in March. Applicant respectfully requests that the Commission deny the hearing requests.

Respectfully submitted,

WINSTEAD PC

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**ATTORNEYS FOR CIRCLE S MIDLOTHIAN LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that on September 27, 2024, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties on the attached mailing list via hand delivery, facsimile transmission, electronic mail, or by deposit in the U.S. Mail in accordance with 30 Tex. Admin. Code § 55.209(d).

/s/ Matthew McPhail  
Matthew McPhail