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Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

September 27, 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 CIRCLE S
MIDLOTHIAN, LLC FOR NEW TPDES PERMIT NO.
WQ0016243001
TCEQ DOCKET NO. 2024-1456-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 "Jessica M. Anderson".

Jessica M. Anderson, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2024-1456-MWD

APPLICATION BY CIRCLE S	§	BEFORE THE
MIDLOTHIAN, LLC FOR NEW	§	
TPDES PERMIT NO.	§	TEXAS COMMISSION ON
WQ0016243001	§	
	§	ENVIRONMENTAL QUALITY

**THE 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 (TCEQ) files this Response to Requests for Hearing on the application in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by Circle S Midlothian, LLC (Applicant) for new Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0016243001. The Commission received timely comments and hearing requests from Emily Rogers on behalf of Ellis County, Hayden Farrell, Maliya Farrell, Phillip Farrell, Jr., Phillip Farrell, Sr., Robyn Farrell, Gabriel Griffin, Jacob Griffin, Nick Griffin, and Rene Griffin. The Commission received a timely hearing request but no comments from Carolyn Taylor. For the reasons stated herein, OPIC respectfully recommends that the Commission find that Ellis County, Hayden Farrell, Maliya Farrell, Phillip Farrell, Jr., Phillip Farrell, Sr., Robyn Farrell,

Gabriel Griffin, Jacob Griffin, Nick Griffin, and Rene Griffin are affected persons, and further recommends that the Commission grant their hearing requests.

B. Description of Application and Facility

Circle S Midlothian applied to the TCEQ for a new TPDES permit to authorize the discharge of treated domestic wastewater at a daily average flow not to 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 Circle S subdivision wastewater treatment plant would be an activated sludge process plant operated in the complete mix mode. Treatment units in the Interim I phase would include a bar screen, two aeration basins, one final clarifier, two sludge digesters, and a chlorine contact chamber. The Interim II phase would add an identical Interim I phase plant. The Final phase would add a circular plant partitioned into a large aeration chamber, two sludge digester chambers, and a chlorine chamber. The draft permit authorizes the disposal of sludge generated from the treatment facility to be disposed of at a TCEQ-permitted landfill or sludge disposal site in Tarrant County.

The proposed plant would be located approximately one mile northeast of the intersection of Murr Road and Farm-to-Market Road 157 in Ellis County. The treated effluent would be discharged to Spring Branch, then to Armstrong Creek, then to Cottonwood Creek, then to North Fork Chambers Creek, then to Chambers Creek above the Richland-Chambers Reservoir in Segment No. 0814 of

the Trinity River Basin. The unclassified receiving waters have limited aquatic life use for Spring Branch and Armstrong Creek. The designated uses for Segment No. 0814 are primary contact recreation, public water supply, and high aquatic life use.

C. Procedural Background

The application was received on October 26, 2022, and declared administratively complete on December 7, 2022. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published on December 11, 2022, in the *Waxahachie Daily Light* and in the *Midlothian Mirror*. The Executive Director (ED) completed the technical review of the application on February 1, 2023. The Notice of Application and Preliminary Decision was published on November 2, 2023, in the *Midlothian Mirror*. A public meeting was held on March 4, 2024, and the public comment period ended at the close of that public meeting. The ED's Response to Comments (RTC) was mailed on July 3, 2024. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was August 2, 2024.

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

30 TAC § 55.201(d).

Under 30 TAC § 55.203(a), an "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. As provided by

§ 55.203(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. Relevant factors to be considered in determining whether a person is affected include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person;
- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

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

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the executive director; and

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

30 TAC § 55.203(d).

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

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

III. ANALYSIS OF HEARING REQUESTS

A. Whether the requestor is an affected person

Ellis County

Emily Rogers submitted timely comments and a hearing request on behalf of Ellis County. The request indicates that Ellis County is an affected person under 30 TAC § 55.203 because the County 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 has authority over various functions—including but not limited to transportation, emergency services, and health and safety—that may be affected by the proposed wastewater treatment

plant and its associated discharge. Further, as a local government, the County has statutory authority to inspect the public water in its jurisdiction to assess whether the quality of the water meets water quality standards and to determine whether wastewater discharges are in compliance with the requirements of a TCEQ-issued permit. Texas Water Code (TWC) § 26.171. In addition to these investigatory powers, the City has the authority to file civil suit in the same manner as the TCEQ for injunctive relief, civil penalties, or both. TWC § 7.351. Finally, the proposed facility is located in Ellis County.

The issues raised in the request include concerns about regionalization, water quality, application accuracy, notice, antidegradation, and Applicant's lack of experience in facility and system operations. Governmental entities, including local governments, with authority under state law over issues raised by the application, may be considered affected persons. 30 TAC § 55.203(b). Furthermore, when determining whether local governments are affected persons, factors related to their statutory authority over or interest in the issues relevant to the application should be considered. 30 TAC § 55.203(c). The County's concerns are protected by the law under which the application will be considered. Further, the County has demonstrated that it has authority under state law over the issues it has raised. Finally, the proposed facility would be constructed entirely within the County. In combination, these factors give the County a personal justiciable interest and distinguish that interest from the general public. Therefore, OPIC finds that Ellis County qualifies as an affected person.

Requestors at 1308 Ozro Road

Hayden Farrell, Maliya Farrell, Phillip Farrell, Jr., Phillip Farrell, Sr., Robyn Farrell, Gabriel Griffin, Jacob Griffin, Nick Griffin, and Rene Griffin all submitted timely comments and hearing requests. These individuals all gave their address as 1308 Ozro Road, Venus, which is the location of their family property. According to the map created by ED staff, this address is 2.9 miles from the proposed facility, and alongside the proposed discharge route. Furthermore, these requestors indicated that Armstrong Creek, which is part of the discharge route, runs through their property. These requestors raised concerns about water quality, recreational use, human health, livestock, wildlife, endangered species, nuisance odors, past noncompliance, application accuracy, regionalization, per- and polyfluoroalkyl substances (PFAS), flooding and erosion, and economic impacts.

These requestors' concerns about water quality, recreational use, human health, livestock, wildlife, endangered species, nuisance odors, past noncompliance, application accuracy, and regionalization, when combined with their proximity to the discharge route, give them a personal justiciable interest in this matter which is not common to the general public. Also, their concerns are interests protected by the law under which this application is considered, and a reasonable relationship exists between those interests and the regulation of the site. Further, there are no distance restrictions imposed by law on these requestors, and Applicant would be discharging a significant volume of effluent - almost one million gallons per day in the Final phase - to the waterway running

through their land. Finally, the location of this property and its proximity to the discharge route increases the likelihood of impacts to health, safety, and use of property. Therefore, OPIC finds that Hayden Farrell, Maliya Farrell, Phillip Farrell, Jr., Phillip Farrell, Sr., Robyn Farrell, Gabriel Griffin, Jacob Griffin, Nick Griffin, and Rene Griffin qualify as affected persons.

Carolyn Taylor

Carolyn Taylor submitted a hearing request but failed to submit any comments. Ms. Taylor gave her address as 377 Eleven League Road, Ennis. According to the map created by ED staff, this address is 29 miles from the proposed facility. Ms. Taylor did not raise any specific issues about this draft permit, she only expressed general concern about the proposed facility.

Under 30 TAC Section 55.201(c), only a requestor who submits timely comments may qualify as an affected person. Given Ms. Taylor's failure to provide comments, in combination with her lack of proximity to the proposed facility and her failure to specify any personal, justiciable interest, OPIC finds that Carolyn Taylor does not qualify as an affected person.

B. Which issues raised in the hearing requests are disputed

The affected requestors raised the following disputed issues:

1. Whether the draft permit is adequately protective of water quality.
2. Whether the draft permit is adequately protective of recreational uses.
3. Whether the draft permit is adequately protective of human health.

4. Whether the draft permit is adequately protective of livestock, wildlife, and endangered species.
5. Whether the draft permit is adequately protective against nuisance odors.
6. Whether the draft permit adequately addresses past noncompliance.
7. Whether the application was accurate.
8. Whether the draft permit violates the TCEQ's policy on regionalization.
9. Whether there was adequate notice.
10. Whether the draft permit violates the TCEQ's antidegradation policy.
11. Whether the draft permit adequately accounts for the Applicant's lack of experience in facility and system operations.
12. Whether the draft permit is adequately protective against PFAS.
13. Whether the draft permit is adequately protective against flooding and erosion.
14. Whether the draft permit is adequately protective against negative economic impacts.

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.

D. Whether the issues were raised during the public comment period

Issues No. 1-14 in Section III.B. were specifically raised by affected requestors 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 public comments.

F. Whether the issues are relevant and material to the decision on the application

The hearing requests raised 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). To refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-51 (1986).

Water Quality, Recreation, Human Health, Livestock, Wildlife, and Endangered Species

Requestors raised concerns about adverse effects to water quality and the consequential impacts on human health, animal life, and the environment. The Commission is responsible for the protection of water quality under Texas Water Code (TWC) Chapter 26 and 30 TAC Chapters 307 and 309. The Texas Surface Water Quality Standards (Standards) in Chapter 307 require that the proposed permit "maintain the quality of water in the state consistent with public health

and enjoyment, propagation and protection of terrestrial and aquatic life, operation of existing industries, and ... economic development of the state....”30 TAC § 307.1. According to § 307.6(b)(4) of the Standards, “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 of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life.” 30 TAC § 307.4. Finally, 30 TAC § 307.4(e) requires that nutrients from permitted discharges or other controllable sources must not cause excessive growth of aquatic vegetation which impairs an existing, designated, presumed, or attainable use. As Chapter 307 designates criteria for the regulation of water quality, the protection of human health and safety, and the protection of animal life, Issues No. 1-4 are relevant and material to the Commission’s decision regarding this application.

Nuisance Odors

TCEQ regulates nuisance conditions under 30 TAC § 309.13(e) which requires applicants to implement a nuisance odor abatement plan. Further, permits issued by TCEQ do not allow the permit holder to create or maintain a nuisance that interferes with a landowner’s use and enjoyment of their property. Because 30 TAC § 309.13 addresses nuisance conditions as described by requestors, Issue No. 5 is relevant and material to the Commission’s decision on this Application.

Past Noncompliance and Applicant's Experience

Requestors raised several concerns regarding the Applicant's past noncompliance. Evidence of competency is required by 30 TAC § 330.593(f), thus rendering requestor's concerns regarding compliance history relevant and material to the Commission's decision on this application. Accordingly, Issues No. 6 and 11 are appropriate for referral to SOAH.

Application Accuracy

TCEQ rules require that if an applicant becomes aware that it failed to submit relevant facts or submitted incorrect information in a permit application, the applicant is required to promptly submit such facts and information. 30 TAC § 305.125(19). Therefore, Issue No. 7 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Regionalization

TCEQ's regionalization policy comes from Section 26.081 of the Texas Water Code, which implements "the state policy to encourage and promote the development and use of regional and area-wide waste collection, treatment, and disposal systems to serve the waste disposal needs of the citizens of the state and to prevent pollution and maintain and enhance the quality of the water in the state." TCEQ's wastewater permit application requires the applicant for a new permit to provide information concerning other wastewater treatment facilities that exist near the applicant's proposed treatment facility site. The applicant is

required to state whether any portion of the applicant's proposed service area is located in an incorporated city, whether its proposed service area is located within another utility's certificate of convenience and necessity area, and whether there is a facility, or any sewer collection lines located within the three-mile area surrounding the proposed facility site. Accordingly, Issue No. 8 is relevant and material to the Commission's decision on this application.

Notice

Chapter 39 contains requirements relating to notice publication, alternative language publication, mailing of notice, and posting of the application in a public place within the county. The issue of whether the applicant complied with all applicable notice requirements is relevant and material to the Commission's decision on this application. Therefore, Issue No. 9 is appropriate for referral to SOAH.

Antidegradation

Antidegradation reviews are governed by 30 TAC § 307.5, which establishes the Commission's antidegradation policy and contains provisions for implementation of the policy. As part of the ED's antidegradation review, the existing uses of a waterbody are determined, and the draft permit is designed to protect those uses. Therefore, Issue No. 10 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

PFAS

Neither TCEQ nor EPA has promulgated rules or criteria limiting emerging contaminants, including PFAS, in wastewater. In addition, there are currently no federal or state effluent limits for emerging contaminants. Therefore, Issue No. 12 is not relevant and material to the Commission's decision on this application.

Flooding and Erosion

TCEQ's jurisdiction is established by statute and does not include authority under the Texas Water Code or its regulations to address or consider flooding when making a decision on issuance of this permit. Therefore, Issue No. 13 is not relevant and material to the Commission's decision on this application.

Economic Impacts

Several requestors raised concerns about the potential economic impact the proposed facility would have on nearby properties. The TCEQ does not have jurisdiction under the Texas Water Code or its regulations to address or consider these types of issues as part of the wastewater permitting process. Water Code Chapter 26 and applicable wastewater regulations do not authorize the TCEQ to consider issues such as economic damages. Therefore, Issue No. 14 is not relevant and material to the Commission's decision on this application.

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

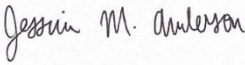
by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 30 TAC § 50.115(d)(2). To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this Application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

Having found that Ellis County, Hayden Farrell, Maliya Farrell, Phillip Farrell, Jr., Phillip Farrell, Sr., Robyn Farrell, Gabriel Griffin, Jacob Griffin, Nick Griffin, and Rene Griffin are affected persons in this matter, OPIC respectfully recommends the Commission grant their hearing requests and refer Issues No. 1-11 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2024, the original of the Office of Public Interest Counsel's Response to Request for Hearing and Request for Reconsideration was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Jessica M. Anderson

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TCEQ DOCKET NO. 2024-1456-MWD

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REQUESTER(S):

See attached list.

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