TCEQ DOCKET NO. 2025-1310-AIR

APPLICATION BY SL ENERGY POWER PLANT I, LLC SL ENERGY POWER PLANT I LEXINGTON, LEE COUNTY	**§ § § § §**	**BEFORE THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

MTGP'S REPLY TO RESPONSES TO HEARING REQUESTS

TO THE HONORABLE COMMISSIONERS:

Neighbors for Neighbors, Inc., d/b/a Move the Gas Plant ("MTGP") hereby submits this Reply to the Responses to Hearing Requests by SL Energy Power Plant I, LLC (the "Applicant" or "SL Energy"), the Executive Director ("ED"), and the Office of Public Interest Counsel ("OPIC") regarding the Application by SL Energy Power Plant I, LLC for Proposed Air Quality Permit Nos. 177380, PSDTX1650, and GHGPSDTX244. The proposed permit would authorize construction and operation of the SL Energy Power Plant I (the "Plant") in Lexington, Lee County, Texas. For the reasons given below, MTGP urges the Commission to find that MTGP is an "affected person," grant its timely-filed hearing requests,[1] and refer the issues raised in these requests to the State Office of Administrative Hearings ("SOAH") for a contested case hearing.

[1] Each request filed by MTGP was timely. The Applicant incorrectly contends that any hearing request filed after Saturday, August 23, 2025 should not be considered. However, because the 30th day after the Chief Clerk's mailing of the response to Comments fell on a Saturday, the hearing request period ran until the end of the next day that was not a Saturday, Sunday or legal holiday (Monday, August 25, 2025) pursuant to 30 Tex. Admin. Code § 1.7.

I. MTGP's requests identify members who are affected persons.

As acknowledged by the ED,[2] MTGP has identified members with property interests within one mile of proposed emission sources. MTGP's requests have described these members' concerns related to their health, the health of their family members, and their use and enjoyment of property. These detailed interests are protected under Texas Health &

Safety Code Chapter 382, and are reasonably related to the Plant's operations to be authorized under the proposed permit. Based on the location of their property and the nature of their interests, each identified MTGP member has a personable justiciable interest.[3] Accordingly, MTGP has satisfied the requirement to identify one or more members who would have standing to request a hearing in their own right, as well as all other requirements of 30 Tex. Admin. Code § 55.205.[4]

MTGP members will be affected by increased levels of pollutants caused by SL Energy operations. Exceedances of National Ambient Air Quality Standards ("NAAQS")

[2] ED's Response to Hearing Requests at 12 and Attachment A.

[3] The only meaningful disagreement concerning MTGP's requests is whether MTGP has identified affected members who would otherwise have standing in their own right. However, to create a smokescreen diverting attention from the relevant legal analysis, Applicant contends that MTGP has misused the public participation process. The unfounded assertion is based only on the fact that two members publicly have noted some of the possible consequences of a hearing. But the noted comments are not inconsistent with MTGP's environmental concerns, nor do the Commission's rules allow for a litmus test and second-guessing of strategies in opposing the placement of a polluting power plant in MTGP members' neighborhood. The overall concern of MTGP is the protection of air quality and the health and interests of its members. All MTGP statements and strategies referenced by the Applicant are encompassed within this overarching purpose.

[4] For applications filed on or after September 1, 2015, a request by a group or association for a contested case may not be granted unless all of the following requirements are met: (1) comments on the application are timely submitted by the group or association; (2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right; (3) the interests the group or association seeks to protect are germane to the organization's purpose; and (4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case. 30 Tex. Admin. Code § 55.205(b).

de minimis levels are predicted for six criteria pollutants as a result of the Plant's emissions.[5] For example, the predicted maximum ground level concentration of PM2.5 for a 24-hour averaging period is 9 µg/m3 (in excess of the NAAQS *de minimis* level of 1.2 µg/m3), and the predicted maximum ground level concentration of PM2.5 for an annual averaging time period is 1.35 µg/m3 (in excess of the *de minimis* level of 0.13 µg/m3).[6] Thus, even the Applicant's modeling (which MTGP challenges in its requests), and the

ED's own reporting of location information for MTGP members,[7] logically supports the conclusion that MTGP members would experience elevated levels of PM2.5 and other pollutants exceeding NAAQS *de minimis* levels.

The ED "believes"[8] that the impact of the proposed facility upon MTGP members would be too small for these members to be affected persons. In stating this belief, the ED relies in part on SL Energy's modeling results representing that maximum concentrations of criteria pollutants would be below *de minimis* levels, or otherwise below the applicable NAAQS.[9] Then, for other pollutants without NAAQS, the ED emphasizes that maximum ground level concentrations of contaminants occurring at a distance of 160 meters (or 525 feet) from emission sources are predicted to be below the state's effects screening levels.[10] The inference to be drawn is an ED position that even if a person is only 525 feet from emission sources, they would not experience an adverse impact from the Plant's emissions.

[5] *See* Applicant's Response to Hearing Requests at 12.
[6] *See* Applicant's Response to Hearing Requests at 12.
[7] *See* ED's Response to Hearing Requests Attachment A.
[8] *See* ED's Response to Hearing Requests at 12.
[9] *Id.*
[10] *Id.*

Following the reasoning provided for the ED's recommendation to deny MTGP's requests, no member of the public could ever be considered an "affected person" on any application. The ED always makes a determination that an application meets applicable requirements before hearing requests are evaluated by the Commission. The ED's reasoning ignores the fact that MTGP has raised issues that *dispute* the sufficiency of the Application and *dispute* the accuracy and reliability of Applicant's modeling and the sufficiency of the ED's technical review.

Furthermore, it must be noted that the ED commonly reduces the "affected person" inquiry to a bright-line issue of whether a person's property is located within one mile of a permitted emission point. Here, the ED's analysis is not only flawed, but also perplexingly inconsistent with past determinations and recommendations.

For example, earlier this year, the ED recommended granting several hearing requests on the application by Wolf Hollow II Power, LLC ("Wolf Hollow") for a permit authorizing operation of new power generation facilities in Granbury, Hood County, Texas (the "Wolf Hollow Application").[11] On February 13, 2025, the Commission granted four of these requests, and referred the following issues for hearing: (1) whether the draft permit will be protective of the health of requesters, their families, and their animals, livestock, and wildlife; and (2) whether the draft permit will be protective of air quality.[12] The four requesters that the Commission found to be affected persons had property and related

[11] TCEQ Air Quality Permit Nos. 175173 and PSDTXl636.
[12] *See* Interim Order concerning the Application by Wolf Hollow II Power, LLC for Air Quality Permit Nos. 175173 and PSDTX1636; TCEQ Docket No. 2024-1918-AIR (**Attachment A** to this Brief).

interests located at respective distances of 0.50 miles (one requester), 0.75 miles (two requesters), and 0.85 miles (one requester) from emission sources. As shown in Table 1 below, a comparison of predicted maximum ground level concentrations shows that pollutant levels for SL Energy would be *higher* than the levels that were predicted for Wolf Hollow for the following criteria pollutants and averaging times: SO2 1-hour; SO2 3-hour; PM10 24-hour; PM10 annual; PM2.5 24-hour; PM2.5 annual; NO2 annual; CO 1-hour; and CO 8-hour.[13]

Table 1: Comparison of GLC_{MAX} Levels Provided by Wolf Hollow and SL Energy

Pollutant and Averaging Period	*De Minimis* GLC_{MAX} ($\mu g/m^3$)	Wolf Hollow GLC_{MAX} ($\mu g/m^3$)	SL Energy GLC_{MAX} ($\mu g/m^3$)
SO_2 1-hour	7.8	1.87	4.1
SO_2 3-hour	2.5	1.06	4
PM_{10} 24-hour	5	1.83	9
PM_{10} Annual	1	0.36	1.4
$PM_{2.5}$ 24-hour	1.2	4.28	9
$PM_{2.5}$ Annual	0.13	0.67	1.35
NO_2 Annual	1	0.58	2
CO 1-hour	2000	181	1251
CO 8-hour	500	19	983

In addition, as Table 1 shows, the SL Energy air quality analyses predict that six NAAQS *de minimis* emission levels will be exceeded, whereas the analyses for Wolf Hollow predicted three exceedances of NAAQS *de minimis* levels. Furthermore, for two pollutant levels above *de minimis* that SL Energy and Wolf Hollow have in common, SL

[13] The information regarding maximum predicted ground level concentrations of pollutants for the Wolf Hollow facility is taken from the January 17, 2025 Wolf Hollow Applicant's Response to Requests for Reconsideration and Requests for Contested Case Hearing (**Attachment B** to this Brief) at 8. The information for SL Energy is taken from this Applicant's Response to Hearing Requests at 12.

Energy's predicted total maximum ground level concentrations of PM 2.5 24-hour and PM 2.5 annual *exceed* the levels predicted for Wolf Hollow.[14]

But in evaluating the pending hearing requests for SL Energy, the ED not only dismissed the affected person status of MTGP members beyond one mile, but also dismissed affected persons much closer to emission sources. For example, the ED has confirmed that the location of affected MTGP member Trish Siler's property is within one mile of the proposed Plant. As discussed in MTGP's requests, Ms. Siler is a disabled U.S. Army veteran who was exposed to toxic emissions from burning oil fields, among numerous other toxic emission sources, while she served in the Gulf War. Emissions from

the proposed Plant would adversely affect Ms. Siler's health by exacerbating her existing health conditions, which include migraines, thyroid nodules, fibromyalgia, and multiple chemical sensitivity (MCS). MTGP has further explained that this affected member and her family spend much of their time outdoors gardening, tending to their cows, goats, and chickens, and enjoying a variety of other outdoor recreational activities. MTGP has demonstrated that Ms. Siler is an affected person with a personal justiciable interest not common to the general public. Yet, under the ED's analysis, this member would be denied the contested case hearing to which she and her family are entitled under state law.

Likewise, Bill and Susan Davis have provided a sufficient explanation of their personal justiciable interests. As MTGP discussed in its hearing requests, the Applicant's

[14] The NAAQS analysis provided for Wood Hollow predicted total maximum ground level concentrations (including background concentrations) as follows: 21.79 µg/m3 for PM 24-hour; and 8.45 µg/m3 for PM 2.5 Annual. *See* Attachment B at 9. The analysis provided for the SL Energy Application predicts such total maximum concentrations as follows: 26 µg/m3 for PM 2.5 24-hour; and 8.6 µg/m3 for PM 2.5 Annual. *See* Applicant's Response to Hearing Requests at 12.

flawed modeling cannot support a conclusion that neighboring residents and landowners are unlikely to experience health impacts or diminished air quality. In the experience of Mr. and Ms. Davis, the prevailing winds and the varying elevations of land in the area of the Plant have not been evaluated properly to account for likely impacts on their health and their use and enjoyment of property. The modeling assumes the area around the Plant is flat; however, this is an inaccurate characterization of the topography. Also, as MTGP discussed in its requests, the monitoring data used for evaluating background levels of contaminants is not from the local area and not representative of local conditions. In short, there's no justification for many of the assumptions used in the modeling. In addition, for all other reasons detailed in Dr. Sahu's report included with MTGP's requests, the modeling

is flawed. MTGP notes again that threshold party standing determinations cannot be based on a presumption that the Applicant and ED ultimately would prevail on substantive disputed issues (such as the accuracy and reliability of modeling and predicted emission levels).

While there is no bright-line distance test, proximity to emission sources is a factor to be considered for affected person analyses under 30 Tex. Admin. Code § 55.203. Considering their interests in protecting their health and use and enjoyment of their property, their proximity to emission sources, and all other factors in 30 Tex. Admin. Code § 55.203, identified MTGP members are affected persons with a personal justiciable interest affected by the Application in a manner that is not common to members of the general public.

II. Applicable law requires the granting of MTGP's hearing request.

The analysis of a hearing request under the "justiciable interest" test of Texas Water Code § 5.115(a) is the same as that for judicial standing in Texas courts. *See, e.g., Heat Energy Advanced Tech., Inc. v. W. Dallas Coal. for Envtl. Justice,* 962 S.W.2d 288, 295 (Tex. App.—Austin 1998, pet. denied). Accordingly, TCEQ's governing statutes and rules regarding affected persons and their right to a hearing are consistent with the judicial constitutional standing principles of Article III. While Senate Bill 709 clarified the factors that the Commission may consider in applying this standard, Senate Bill 709 did not alter the core element of the affected person inquiry as an issue of whether a person possesses a justiciable interest.[15] As the Fifth Circuit has noted in applying such standing principles, "[T]he Constitution draws no distinction between injuries that are large, and those that are

comparatively small." *Cramer v. Skinner*, 931 F.2d 1020, 1027 (5th Cir. 1991). In affirming this principle, the United States Supreme Court has noted that the standing threshold "serves to distinguish a person with a direct stake in the outcome of litigation—even though small—from a person with a mere interest in the problem." *U.S. v. Students Challenging Regul. Agency Procedures (SCRAP)*, 412 U.S. 669, 734 (1973). MTGP and its members have shown they have a direct stake in the protectiveness of the proposed permit.

If a person demonstrates that they satisfy the definition of an affected person—that is, that they possess "a personal justiciable interest related to a legal right, duty, privilege,

[15] *See* Tex. Water Code § 5.115(a) ("For the purpose of an administrative hearing held by or for the commission involving a contested case, "affected person," or "person affected," or "person who may be affected" means a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing.").

power, or economic interest affected by the administrative hearing"—and if they raise a relevant disputed issue of fact that was also raised in their comments, then the Commission must grant the hearing request. The Commission enjoys no discretion to deny a hearing request if all requirements have been met. Tex. Water Code § 5.556; 30 Tex. Admin. Code § 55.211(c); *see also City of Waco v. Tex. Comm'n on Envtl. Quality*, 346 S.W.3d 781, 824 (Tex. App.—Austin 2011), *rev'd on other grounds*, 413 S.W.3d 409, 411 (Tex. 2013). Adoption of the ED and Applicant's position—that TCEQ has unfettered discretion to resolve the merits of a permit in determining who has standing for a contested case hearing—would undermine the foundation of the agency's legislatively-mandated public participation process and deprive affected persons of due process.

Applying the constitutional standing principles of Article III, the United States Supreme Court has held that if the merits of a plaintiff's claim are intertwined with a

challenge to plaintiff's standing, then disputed facts must be decided in the plaintiff's favor and the case should progress to its merits stage. *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561 (1992); *see also Williamson v. Tucker*, 645 F.2d 404, 415–16 (5th Cir. 1981) (attacks on the merits of a plaintiff's claim as a jurisdictional question can only be granted if the "there are no issues of material fact."). Therefore, the argument that TCEQ has absolute discretion to resolve all disputed issues of material fact in its preliminary determination of who is an affected directly contradicts well-established constitutional principles for evaluating standing.

To be clear, affected persons need not prove the merits of their case in order to demonstrate standing to obtain a hearing. *Heat Energy Advanced Tech., Inc. v. W. Dallas*

Coal. for Envtl. Justice, 962 S.W.2d 288, 295 (Tex. App.—Austin 1998, pet. denied); *see also City of Waco*, 346 S.W.3d at 824 (explaining that the affected person determination for a wastewater discharge permit "is analogous to a civil claimant's right to have disputed material fact issues determined at trial," and, therefore, "[w]here 'affected person' status turns on the same disputed facts" the Commission is precluded "from determining those facts without affording the hearing requestor…a contested case hearing."). The affected person standard "simply requires them to show that they will potentially suffer harm or have a justiciable interest that will be affected." *United Copper Indus., Inc. v. Grissom*, 17 S.W.3d 797, 803 (Tex. App.—Austin 2000, pet. dism'd) (reversing TCEQ's denial of hearing request for air permit because TCEQ improperly weighed evidence against hearing requestor at the standing phase).[16]

Furthermore, caselaw cited by the Applicant is distinguishable. In *Sierra Club v.*

Texas Commission on Environmental Quality, 455 S.W.3d 214 (Tex. App.—Austin 2014, pet. denied), the Court reviewed affected person determinations with respect to a radioactive materials facility license for which the Commission had jurisdiction under a different statutory framework, the Texas Radiation Control Act, Texas Health & Safety Code Chapter 401. The Court found organization members were not "affected persons" after determining their property interests were located more than three miles from the proposed facility, they did not spend time near the proposed facility, and they raised

[16] *See also Heckman v. Williamson Cnty*., 369 S.W.3d 137, 149–50 (Tex. 2012) (holding that courts construe pleadings liberally in favor of plaintiffs, accept allegations in pleadings as true to determine if pleader has alleged sufficient facts to demonstrate jurisdiction, and if defendant challenges the existence of jurisdictional facts in the plaintiffs' pleadings, then, the defendant must present undisputed, relevant evidence negating the existence of the court's jurisdiction, to prevail on plea to the jurisdiction).

concerns about traffic and railway safety that were outside the Commission's jurisdiction. *Sierra Club v. Tex. Comm'n on Envtl. Quality*, 455 S.W.3d at 224–25.

Similarly, the *City of Waco* decision by the Texas Supreme Court is distinguishable and does not support a denial of MTGP's hearing requests. In *City of Waco*, the Texas Supreme Court was presented with the issue of whether TCEQ erred in denying the City's hearing request opposing an application to amend a wastewater discharge permit subject to Texas Water Code Chapter 26. The decision of the appellate court was reversed, not on grounds related to an affected person analysis, but because the Court found there was no right to hearing under unique statutory provisions applicable to that particular type of permit amendment application. The Court focused on whether a legal right to a contested case hearing even existed under the applicable provisions of the Texas Water Code: "[E]ven assuming the City might otherwise qualify as an affected person under the statute's definition, it may still not be entitled to a public hearing if section 26.028(d)'s exception

reasonably applies."[17] *City of Waco*, 413 S.W.3d at 424.

The Court thus focused its analysis on whether the Commission properly exercised its discretion to deny a hearing on an amended permit that maintains or improves the quality of the wastewater discharge and that neither significantly increases the quantity of waste authorized to be discharged, nor changes materially the pattern or place of discharge—*irrespective of whether the City of Waco demonstrated it was an affected person. Id*. at 423.

[17] The exception to which the court referred, found in Texas Water Code § 26.028(d), exempts from public hearing requirement applications to amend or renew water quality permits if the applicant is not applying to: (1) increase significantly the quantity of waste authorized to be discharged; or (2) change materially the pattern or place of discharge; and the activities to be authorized will maintain or improve the quality of waste authorized to be discharged. *City of Waco*, 413 S.W.3d at 419.

Ultimately, the Court determined that there was no legal right to a contested case hearing because of an exception to that permit amendment application under Texas Water Code § 26.028(d). *Id.* at 424 (distinguishing *Grissom*, 17 S.W.3d 797, and *Heat*, 962 S.W.2d 288). Consequently, the Court never reached the issue of whether the City was an affected person. In short, *City of Waco* involved a different type of permit application, under a different statute, with different contested case hearing requirements than the SL Energy Application. Unlike in *City of Waco*, there is no exception to the right to a public hearing that applies here. The *City of Waco* case simply does not support Applicant's recommendation to deny the pending hearing requests.

Furthermore, in *Collins v. Texas Natural Resource Conservation Commission*, 94 S.W.3d 876 (Tex. App.—Austin 2002, no pet.), the Commission *did* refer disputed issues of fact to SOAH regarding the accuracy of an applicant-provided map and the hearing requester's location. *Collins,* 94 S.W.3d at 881. Only after adopting the Administrative Law Judge's findings of fact and conclusions of law determining that the applicant's map

was accurate did the Commission deny the pending hearing request. The Court further noted that, under applicable law for this particular regulated activity, the applicant's concentrated animal feeding operation could have qualified for a standard permit without even the opportunity for a contested case hearing because of the distance between permanent odor sources and occupied structures. *Id.* at 883. For these reasons, the *Collins* case is distinguishable and does not support denial of MTGP's hearing request.

III. Denying hearing requests based solely on disputed materials and opinions provided by the ED and Applicant deprives hearing requesters of due process.

Adopting the position of ED and Applicant—denying hearing requests because the application file contains some basis to support issuance of the permit (though that basis is disputed)—would deprive requesters of due process. When requesters have otherwise shown that their interests are not common to the general public because of their location or other factors, deciding disputed technical issues against them without the opportunity for meaningful scrutiny violates their due process rights. MTGP and its members have raised issues disputing whether application information is accurate and reliable, and whether the ED's technical review is sufficient. Due process requires the opportunity for meaningful scrutiny of the issues before the merits of an application can be decided. The Applicant and ED's approach here would deprive Texans of due process by creating an insurmountable burden for any affected person to challenge the ED's determination that an application is technically complete. Adopting this flawed analysis of standing would undermine the spirit and purpose of the agency's statutory public participation procedures. To be clear, before hearing requests are ever considered by the Commission, the ED must first declare the application technically complete and prepare a draft permit—meaning the ED (alone) has

determined the application is accurate and includes the information required by applicable statutes and rules. *See* 30 Tex. Admin. Code § 281.21. The declaration of technical completeness will be contained in the file regardless of the validity of any issues raised in timely-filed affected persons' hearing requests which question the accuracy and reliability of the ED's review. To deny standing to a facility's neighbors by way of presuming a

disputed technical review is accurate and reliable would be unsupportable by the caselaw discussed in Section II. The Applicant and ED's approach violates due process rights afforded members of the public under applicable law.

IV. Conclusion

For the reasons stated above, MTGP has identified affected members with personal justiciable interests and met all other requirements of 30 Tex. Admin. Code § 55.205. MTGP respectfully requests that the Commission grant its hearing requests and refer the issues raised in these requests to SOAH for a contested case hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that, on October 10, 2025, a true and correct copy of the foregoing document was served upon the following parties via electronic mail and certified mail, return receipt requested.

/s/ Vic McWherter

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