

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

TCEQ DOCKET NO. 2025-1310-AIR

MOVE THE GAS PLANT'S MOTION FOR REHEARING

TO THE HONORABLE COMMISSIONERS:

Neighbors for Neighbors, Inc., d/b/a Move the Gas Plant (“MTGP”) hereby submits this Motion for Rehearing of the Texas Commission on Environmental Quality’s October 29, 2025 Final Order denying MTGP’s hearing requests, and granting the applications by SL Energy Power Plant I, LLC (“SL Energy” or “Applicant”) for Proposed Air Quality Permit Nos. 177380, PSDTX1650, and GHGPSDTX244 (the “Applications”). MTGP urges the Commission to set these Applications for rehearing and, upon rehearing, grant MTGP’s hearing requests and refer the Applications to the State Office of Administrative Hearings (“SOAH”) for a contested case hearing. In the alternative, MTGP requests that the Commission deny each of the three permits (Permit Nos. 177380, PSDTX1650, and GHGPSDTX244) upon rehearing, without referral to SOAH. For support, MTGP respectfully offers the following:

I. Introduction

On August 22, 2024, SL Energy Power Plant I, LLC filed its Applications for Proposed Air Quality Permit Nos. 177380, PSDTX1650, and GHGPSDTX244 with the Texas Commission on Environmental Quality (“TCEQ” or the “Commission”). The proposed permits would authorize construction and operation of SL Energy Power Plant I (the “Facility”) in Lexington, Lee County, Texas. The Executive Director of the TCEQ (“ED”) determined the Applications to be administratively complete on September 4, 2024. On March 14, 2025, the ED declared that the Applications were technically complete and

issued a draft permit. On October 22, 2025, the Commission convened a public meeting during which they voted to deny all requests for a contested case hearing and to issue the proposed permits to SL Energy. The Commission issued a Final Order on October 29, 2025, memorializing the decision and issuing the proposed permits to SL Energy.

II. The Commission erred in denying MTGP's hearing requests.

MTGP thoroughly explained why its hearing requests should be granted in its Reply to the Responses to Hearing Requests, the arguments from which are incorporated herein. The Commission should recognize its error and grant MTGP's hearing requests upon rehearing.

A. MTGP's requests identified members who are affected persons.

As acknowledged by the ED,¹ MTGP identified members with property interests near the proposed emission sources, some of whom are undisputedly within one mile of the proposed Facility. MTGP's requests 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 Facility's operations to be authorized under the proposed permits.

¹ Attachment A at p. 12.

Based on the location of their property and the nature of their interests, each identified MTGP member has a personable justiciable interest.² 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 § 55.205.³

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

de minimis levels are predicted for six criteria pollutants as a result of the Facility's emissions.⁴ For example, the predicted maximum ground level concentration of PM2.5 for a 24-hour averaging period is 9 $\mu\text{g}/\text{m}^3$ (in excess of the NAAQS *de minimis* level of 1.2 $\mu\text{g}/\text{m}^3$), and the predicted maximum ground level concentration of PM2.5 for an annual averaging time period is 1.35 $\mu\text{g}/\text{m}^3$ (in excess of the *de minimis* level of 0.13 $\mu\text{g}/\text{m}^3$).⁵ Thus, even the Applicant's modeling (which MTGP challenges in its requests), and the

² The only meaningful disagreement concerning MTGP's hearing requests was whether MTGP 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 alleged in its Response to Hearing Requests that MTGP misused the public participation process. The unfounded assertion was 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 Facility 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.

³ 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).

⁴ See Attachment A at p. 12.

⁵ See Attachment A at p. 12.

ED's own reporting of location information for MTGP members,⁶ 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"⁷ 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 relied 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.⁸ Then, for other pollutants without NAAQS, the ED emphasized 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.⁹ 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 Facility's emissions.

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 ignored the fact that MTGP has raised issues that *dispute* the sufficiency of the

⁶ See Attachment A.

⁷ See Attachment A at p. 12.

⁸ *Id.*

⁹ *Id.*

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 Commission commonly reduces the "affected person" inquiry to a bright-line issue of whether a person's property is located within 1 mile of a permitted emission point. Nonetheless, even for minor source permits, there are examples of affected person status being conferred to protesting individuals residing beyond 1 mile.¹⁰ Moreover, for major sources such as SL Energy's Facility, the emission of air contaminants at higher levels has warranted finding affected person status at further distances from a proposed site than 1 mile. Indeed, affected person status and standing have been conferred on individuals located 4 or more miles from certain other major source

facilities.¹¹ In consideration of this context and history, the ED’s and Commission’s

¹⁰ See Application by Ingram Concrete, LLC for Permit No. 152417L001; TCEQ Docket No. 2019-0902-AIR (after considering all requests, consistent with the ED’s recommendation, the Commission granted the hearing request of one entity and six individuals, finding the individuals lived or were located either within 1 mile or slightly over 1 mile from the location of the proposed plant and had identified personal justiciable interests) (Attachment B); *see also* Application of Martin Marietta Materials Southwest, LLC for Amendment and Renewal of Air Quality Permit No. 4189; TCEQ Docket No. 2021-0054-AIR (after considering all requests, consistent with the ED’s recommendation, the Commission granted the contested case hearing request of one individual residing 1.13 miles, finding them to be an affected person who had identified personal justiciable interests not common to the general public) (Attachment C).

¹¹ See Application of Air Quality Permit No. 102892 for the Construction of a New Ethylene Production Unit at ExxonMobil’s Baytown Olefins Plant.; SOAH Docket No. 582-13-4611; TCEQ Docket No. 2013-0657-AIR) (an individual qualified as an affected person in a challenge to ExxonMobil’s Baytown Ethylene plant permit based in part on her ownership of a motorcycle repair shop which was located 4-5 miles from the plant, and her home was about three blocks from the shop); Application for Air Quality Permit Nos. 85013, PSD-TX-1138, and HAP 48 for the Las Brisas Energy, Center LLC; SOAH Docket No. 582-09-2005; TCEQ Docket No. 2009-0033-AIR; (individuals were admitted as affected persons who lived more than 10 miles from the plant site, and more than a dozen individuals were admitted as affected persons who lived more than 5 miles from the facility) (Attachment D); Application for Air Quality Permit Nos. 79188, PSD-TX-1072 and HAP 14 for NRG Texas Power LLC; SOAH Docket Nos. 582-0861 and 582-08-4013; TCEQ Docket Nos. 2007-1820-AIR and 2008-1210-AIR; (affected party status was granted to an individual who lived approximately 4 miles from the facility) (Attachment E). Application by Port Arthur LNG, LLC for Air Quality Permit Nos. 158420, PSDTX1572, and GHGPSDTX198, SOAH Docket No. 582-22-0201, TCEQ Docket No. 2021-0942-AIR (affected party status granted to organization based on member with residence approximately 4 miles from the facility’s property boundary, and five miles from the proposed

affected person analysis for the SL Energy Facility was not only flawed, but also perplexingly inconsistent with past determinations and recommendations. This is particularly true given MTGP member Ms. Siler’s stated interests and the undisputed location of her family residence within 1 mile of SL Energy’s proposed Facility.

For further comparison, 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”).¹² 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 requestors, their families, and their animals, livestock, and wildlife; and (2) whether the draft permit will be protective of air quality.¹³

The four requestors that the Commission found to be affected persons had property and related interests located at respective distances of 0.50 miles (one requestor), 0.75 miles (two requestors), and 0.85 miles (one requestor) 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

emissions sources within the property, whom was 65 years old with decreased lung capacity and on medication for a heart condition. (See Order No. 1 in the Matter of the Application by Port Arthur LNG, LLC for Air Quality Permit Nos. 158420, PSDTX1572, And GHGPSDTX198)(Attachment F).

¹² TCEQ Air Quality Permit Nos. 175173 and PSDTX1636.

¹³ 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 G).

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3-hour; PM10 24-hour; PM10 annual; PM2.5 24-hour; PM2.5 annual; NO2 annual; CO 1-hour; and CO 8-hour.¹⁴

Pollutant and Averaging Period	De Minimis GLC _{MAX} (µg/m ³)	Wolf Hollow GLC _{MAX} (µg/m ³)	SL Energy GLC _{MAX} (µg/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

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

In addition, as Table 1 shows, the SL Energy air quality analyses predicted 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

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.¹⁵

¹⁴ 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 H) at p. 8. The information for SL Energy is taken from this Applicant's Response to Hearing Requests at p. 12.

¹⁵ The NAAQS analysis provided for Wolf Hollow predicted total maximum ground level concentrations (including background concentrations) as follows: 21.79 $\mu\text{g}/\text{m}^3$ for PM 24-hour; and 8.45 $\mu\text{g}/\text{m}^3$ for PM 2.5 Annual. *See* Attachment H at p. 9. The analysis provided for the SL Energy Applications predicts such total maximum concentrations as follows: 26 $\mu\text{g}/\text{m}^3$ for PM 2.5 24-hour and 8.6 $\mu\text{g}/\text{m}^3$ for PM 2.5 Annual. *See* Applicant's Response to Hearing Requests at p. 12.

The Commission erred not only in denying MTGP's hearing requests, but also in failing to provide a reasoned explanation for the Commission's departure from its own prior precedent relating to the consideration of hearing requests related to air quality permit applications.

But in evaluating the pending hearing requests for SL Energy, the ED and the Commission not only dismissed the affected person status of MTGP members beyond 1 mile, but also dismissed affected persons much closer to emission sources. For example, the ED confirmed that the location of affected MTGP member Trish Siler's property is within one mile of the proposed Facility. 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 during Operation Desert Storm. She drove semi-trucks bound for incineration in burn pits where the soldiers' collective waste was burned, and witnessed frequent explosions of intercepted missiles and destruction of chemical weapons stockpiles.

Ms. Siler moved to her property in 2018 after a long search for a place that would give her a sense of safety and seclusion, as well as provide enough space for her daughter,

son-in-law, and grandchildren. She feels responsible for the protection of her grandchildren, ages 8, 5, and 2, and values the fact that they can play outside in a healthy environment with clean air. Emissions from the Facility will potentially hinder her family's ability to garden, tend to their animals, teach the kids how to ride a bike, or even just take a quiet walk down a country lane.

Additionally, emissions from the Facility will potentially adversely affect Ms. Siler's health by exacerbating her existing health conditions, which include migraines, thyroid nodules, fibromyalgia, and multiple chemical sensitivity (MCS). With a condition like MCS, even very low levels of chemical exposure can trigger symptoms. Ms. Siler is not just a concerned citizen; she lives in the immediate vicinity of the proposed Facility, and is justifiably concerned that, if this air permit is upheld, it will negatively impact her day-to-day life, including her physical and mental well-being. 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 and the Commission's decision, this member was denied the contested case hearing to which she and her family are entitled under State law.

Likewise, MTGP has demonstrated that Hugh Brown possesses personal justiciable interests in the Applications. Mr. Brown owns and resides on 153 acres within close proximity to the proposed Facility site. Mr. Brown's primary use of his property is wildlife management. For 50 years, he has maintained his land as a wildlife refuge, specializing in native birds. His property was the first in Lee County to receive a wildlife management tax valuation. Wildlife rescue and rehabilitation organizations have used this property as a

release site. Texas A&M entomology students have used this wildlife refuge for field studies to collect insects, and other Texas A&M researchers have collected insects here for purposes of studying Chagas Disease.

Over the years, Mr. Brown has created miles of paths throughout the property. Mr. Brown spends much of his time outdoors working on his land and walking the property for

censusing bird populations. The Facility's emissions would negatively impact the air quality and use and enjoyment of Mr. Brown's property as a wildlife refuge. He is concerned about the impact of emissions on his health and the health of his property's abundant wildlife and habitat. Such impacts will adversely impact Mr. Brown's aesthetic enjoyment of his property.

Finally, MTGP has demonstrated that Bill and Susan Davis possess personal justiciable interests affected by the Applications. Mr. and Ms. Davis own and reside on 68 acres in close proximity to the proposed Facility site. Other family members residing on site include Mr. and Ms. Davis's daughter and her young family. Davis family members use the property for gardening, bird watching, enjoying wildlife, running, camping, and hunting. They also have pets, cows, and other livestock on their land. The family spends much of its time outdoors. The Facility's emissions would negatively impact the air quality and use and enjoyment of Mr. and Ms. Davis's property. These MTGP members are concerned that the Facility's emissions will also cause adverse health effects for all family members—particularly for Mr. Davis, who suffers from pulmonary disease and has experienced a heart attack following a triple bypass procedure

As MTGP discussed in its hearing requests, the Applicant's 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 Facility 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 Facility is flat; however, this is an

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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 is 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,¹⁶ 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, all other factors in 30 Tex. Admin. Code § 55.203, and the history of prior Commission decisions on affected person status, identified MTGP members are affected persons with a personal justiciable interest affected by the Applications in a manner that is not common to members of the general public. The Commission erred, therefore, in denying MTGP's hearing requests, and it should be

granted on rehearing.

B. Applicable law required the granting of MTGP’s hearing requests.

¹⁶ Dr. Sahu’s report was attached to MTGP’s comments and hearing request from April 24, 2025. A true and correct copy of the report is included with this motion (Attachment I to this brief.) That report is incorporated herein for all purposes.

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.¹⁷ As the Fifth Circuit has noted in applying such standing principles, “The 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.” *United States v. Students Challenging Regulatory 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,

¹⁷ 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” under Tex. Water Code § 5.115(a)—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), order vacated (Feb. 1, 2013), rev’d, 413 S.W.3d 409 (Tex. 2013). The Commission’s 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—undermines the foundation of the agency’s legislatively-mandated public participation process, and in this case it deprived affected persons of due process. TCEQ’s decision fails to give adequate protection to the private property rights of MTGP’s members.

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 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*, 962 S.W.2d 288 at 295; *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).¹⁸

Furthermore, to the extent the ED and the Commission relied on caselaw cited by the Applicant in its Response to Hearing Requests, that reliance was in error, as those cases were distinguishable. In *Sierra Club v. Texas Commission on Environmental Quality*, 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. *Sierra Club v. Tex. Comm’n on Envtl. Quality*, 455 S.W.3d 214 (Tex. App.—Austin 2014,

¹⁸ 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).

pet. denied). 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 concerns about traffic and railway safety that were outside the Commission’s jurisdiction. *Sierra Club*, 455 S.W.3d at 224–25.

Similarly, the *City of Waco* decision by the Texas Supreme Court was distinguishable and did 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.”¹⁹ *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

¹⁹ 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.

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. 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*, the Commission *did* refer disputed issues of fact to SOAH regarding the accuracy of an applicant-provided map and the hearing requestor's location. *Collins v. Tex. Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 881 (Tex. App.—Austin 2002, no pet.). 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 was distinguishable and did not support denial of MTGP's hearing request.

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

Insofar as the Commission adopted 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)—it deprived requestors of due process. When requestors 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 raised issues disputing whether the Applications' 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, as adopted by the Commission, has deprived 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. The Commission's acquiescence in this flawed analysis of standing has undermined 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 subsection (b) *supra*. The Commission's adoption of the Applicant and ED's approach has violated due process rights afforded members of the public under applicable law.

III. The Commission erred in granting Permit Nos. 177380, PSDTX1650, and GHGPSDTX244 to SL Energy.

Even if the Commission does not grant MTGP's hearing requests upon rehearing, it should deny SL Energy's its requested permits outright. Even without the opportunity for a contested case hearing, MTGP included sufficient evidence in its comments and hearing requests to demonstrate that each of the three SL Energy permits should be denied. Dr. Sahu's report²⁰ identified numerous major flaws with SL Energy's permit Applications, including but not limited to the following:

A. The permit improperly allows for indeterminate exemptions for periods of startup.

By the terms of the permit, a planned startup is defined as continuing until emissions compliance is achieved.²¹ This definition allows for an indefinite period of exemption from

²⁰ See *infra* note 16; Attachment I.

²¹ Special Conditions, 6.A.

applicable requirements without regard for the time period feasibly necessary for startup to be achieved. This improperly exempts emissions which should be subject to control, and subject to consideration in determining whether emissions from the facility will contribute to a violation of applicable requirements.

B. The emissions from the Facility risk contributing to the area being considered in non-attainment with respect to ozone.

The Austin-Round Rock-San Marcos metropolitan statistical area (MSA) exceeded the current NAAQS for 8-hour ozone pollution levels in 2023. To the knowledge of MTGP, finalized data is not yet available regarding exceedances occurring in 2024. This history of exceedances places the area at risk of being in a status of non-attainment with regard to the 8-hour ozone pollution standard. The proposed Facility will emit significant quantities of NOx, which are precursors to the formation of ozone. This will contribute to the already elevated ozone levels in the Austin-Round Rock-San Marcos MSA. The potential for the Facility to contribute to a nonattainment condition in the Austin area warrants denial of the Applications.

C. The permit limits do not accurately reflect implementation of Best Available Control Technology (BACT).

A deficiency in the BACT analysis for multiple contaminants is the ED's failure to account for BACT in relationship to startup events. The permit should include limitations that require the implementation of the best available technology for reducing emissions during this time period. No such emission limits are established within the permit.

With regard to VOC, the establishment of an emission limitation based on a 24-hour average fails to reflect implementation of available BACT. Proper assurance of BACT

compliance requires a shorter averaging period for VOC emissions.

The BACT determination for particulate matter suffers from a similar deficiency, in that no averaging time is established by which compliance can be determined for control of particulate matter. BACT for particulate matter should be set at a level consistent with available technology, with compliance monitored by continuous emission monitoring systems.

In addition, the allowed emission rate for ammonia of 10 ppm far exceeds what is appropriately considered BACT for ammonia. The emission limit for ammonia should reflect implementation of proper operation and maintenance practices which minimize ammonia emissions.

The BACT analysis is required not only for Permit No. PSDTX1650, but also for authorization under SL Energy's Greenhouse Gas ("GHG") PSD authorization, Permit No. GHGPSDTX244. GHGs are the aggregate group of six greenhouse gases: carbon dioxide (CO₂), nitrous oxide (N₂O), methane (CH₄), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆). GHGs are a regulated pollutant under the PSD program when emissions exceed the thresholds in 30 TAC §116.164(a)(1) or (a)(2). There is no minor source program for GHGs. As a new major source subject to PSD review for other non-GHG pollutant emissions and with the potential to emit GHG pollutants above threshold levels, SL Energy's GHG emissions are subject to regulation

this authorization should be denied.

D. The permit fails to incorporate the emission limits of 30 Tex. Admin. Code § 111.153.

Pursuant to 30 Tex. Admin. Code § 111.153(c), the emissions from a gas fuel-fired steam generator with a heat input greater than 2,500 million Btu per hour may not exceed 0.1 pound of total suspended particulate per million Btu averaged over a two-hour period. This limitation is not included within the permit.

E. The permit fails to ensure that the Facility will be protective of health and public property.

TCEQ Rules explicitly require that each application must contain information demonstrating that a facility will be protective of the health and property of the public:

In order to be granted a permit . . . the application must include . . . (2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following:

- (A) Protection of public health and welfare
 - (i) The emissions from the proposed facility will comply with all rules and regulations of the commission and with the intent of the Texas Clean Air Act (TCAA), including protection of the health and property of the public.

Similarly, the agency's Rules governing air quality permits provide that:

No person shall discharge from any source whatsoever one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or adversely affect human health

²² 30 Tex. Admin. Code §116.164(a)(1).

or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property.

In this case, the proposed Facility will be in close proximity to a number of residences. Yet, the Applications lack the necessary analysis to demonstrate that the emissions from the

Facility, including fugitive emissions from all operations at the Facility, will be protective of public health and the property of those in the area of the proposed Facility. Hazardous air pollutants such as ammonia and formaldehyde have the potential for such impacts, and the analysis performed does not address the heightened potential for impacts upon health and welfare given the proximity of sensitive receptors to the proposed Facility.

F. The modeling provided in support of the Applications is inadequate.

The report of Dr. Sahu explained numerous errors in the modeling presented in support of the Applications.²³ In addition to the issues raised in Dr. Sahu's report, the Applicant has not demonstrated that the source is isolated, and it has not been demonstrated that the background ambient concentrations are adequate without a consideration of specific modeling of other nearby sources.

IV. Conclusion

In sum, for the reasons stated above, TCEQ's denial of MTGP's hearing requests is: (1) in violation of constitutional or statutory provisions; (2) in excess of TCEQ's authority; (3) made through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the

²³ See *infra* note 16; Attachment I.

record as a whole; and (5) arbitrary and capricious and characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

In addition, TCEQ's grant of Permit Nos. 177380, PSDTX1650, and GHGPSDTX244 was, with respect to each and all of these authorizations: (1) in violation of constitutional or statutory provisions; (2) in excess of TCEQ's authority; (3) made

through unlawful procedure; (4) affected by other error of law; (5) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; and (5) arbitrary and capricious and characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

For the reasons stated above, MTGP urges the Commission to set SL Energy's Applications for rehearing and, upon rehearing, grant MTGP's contested case hearing requests and refer this matter to SOAH for a contested case hearing. Alternatively, MTGP requests that the Commission deny each of the three permits (Permit Nos. 177380, PSDTX1650, and GHGPSDTX244) upon rehearing, without referral to SOAH. MTGP further requests such other and further relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that, on November 24, 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.