

Buddy Garcia, *Chairman*
Larry R. Soward, *Commissioner*
Bryan W. Shaw, Ph.D., *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 25, 2008

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

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2008 FEB 25 PM 4: 29
CHIEF CLERKS OFFICE

RE: SAFETY-KLEEN SYSTEMS, INC.
TCEQ DOCKET NO. 2006-1904-IHW

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script that reads "Emily A. Collins".

Emily A. Collins, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512-239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512-239-1000 • Internet address: www.tceq.state.tx.us

TCEQ DOCKET NO. 2006-1904-IHW

**IN THE MATTER OF THE
APPLICATION OF SAFETY-KLEEN
SYSTEMS, INC FOR HAZARDOUS
WASTE PERMIT RENEWAL AND
MAJOR AMENDMENT PERMIT NO.
50163.**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

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

COMES NOW, the Office of Public Interest Counsel ("OPIC") of the Texas Commission on Environmental Quality (the "Commission" or "TCEQ") and files this Response to Hearing Requests in the above-referenced matter, and would respectfully recommend referring this matter to the State Office of Administrative Hearings ("SOAH").

I. INTRODUCTION

Safety-Kleen Systems, Inc, (hereinafter "Applicant" or "Safety-Kleen") submitted a application to TCEQ on March 9, 2004, for a renewal and major amendment to authorize the storage and processing of commercial industrial and municipal hazardous wastes and Class 1, Class 2 and Class 3 industrial solid waste. The renewal requests continued authorization for operation of seven existing container storage areas, thirty-eight existing tanks, five existing miscellaneous units, forty-three tanks (permitted but not constructed) and two container storage areas (permitted but not constructed). The major amendment portion of the application requests a new container storage area resulting in increased storage capacity and additional Environmental Protection Agency waste codes to be included in permitted wastes managed at the facility.

The Executive Director's ("ED's") draft permit establishes, *inter alia*, general provisions for management, operation, and closure of the facility; requires the permittee to establish and

maintain financial assurance in the amount of \$1,648,328 (2004 dollars); requires controlled access to the facility; specifies minimum physical conditions, training, routine inspections, contingency plan, and emergency procedures for the facility unit; and specifies management of industrial solid waste, including hazardous industrial solid wastes. The proposed facility is at 1722 Cooper Creek Road on a 21.1566 acre tract in the City of Denton, Denton County, Texas. Wastes will be both generated on the site and received commercially from off-site sources. The following wastes are proposed to be managed at the facility: spent parts of cleaning solution, spent immersion cleaner, dry cleaning, tank sediment, dumpster sediment, paint waste, spent antifreeze, soils/liquid-solid debris/absorbents/PPE/Sludges for recycling, fuel blending, or bulking, spent halogenated solvents/chemicals for recycling, fuel blending, or bulking, spent non-halogenated solvents/chemicals for recycling, fuel blending, or bulking, wastes for fuel blending or bulking, solids for fuel blending or bulking, carbon filter solids, wastewater for recycling, fuel blending, or bulking, mixed lab packs for storage and processing, acidic waste, caustic waste, waste for storage, PCB waste, photoimaging waste, oil/oil filters, empty containers, scrap metal, compressed gases, and plant trash.

The Executive Director ("ED") declared the application administratively complete on August 11, 2004. The Applicant published a Notice of Receipt of Application and Intent to Obtain an Industrial and Hazardous Waste Permit Amendment and Renewal on August 25, 2004, in the *Denton Record-Chronicle*. A Notice of Application and Preliminary Decision on October 27, 2005, in *The Dallas Morning News* and was published again on December 19, 2005, in the *Denton Record-Chronicle*. Public meetings were held on December 13, 2004, and March 28, 2006. The public comment period ended on March 28, 2006. The ED issued a Response to

Public Comment on October 3, 2006. TCEQ received timely hearing requests from E. Parks Olmon and Delores Olmon, Joy Powell, Citizens for Healthy Growth, and Dee Wooten.

Based on the information submitted in the requests and a review of the information available in the Chief Clerk's file on this application, OPIC recommends granting the hearing requests.

II. APPLICABLE LAW

The Executive Director declared this application administratively complete on August 11, 2004. As the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of Texas Water Code section 5.556, added by Act 1999, 76th Leg., ch. 1350 (commonly known as "House Bill 801"). Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application. 30 TEXAS ADMIN. CODE ("TAC") § 55.201(d).

Under 30 TAC section 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." This justiciable interest does not include an interest common to the general

public. *Id.* Relevant factors that will 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, safety, and use of property of the person;
- (5) likely impact of the regulated activity on use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

The Commission shall grant an affected person's timely filed hearing request if: (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

Furthermore, pursuant to 30 TAC section 55.205(a), a request for hearing from a group or association must demonstrate the following:

- (1) one or more members of the group would otherwise have standing to request a hearing in their own right;

- (2) the interests the group seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

III. DISCUSSION

A. Right to a Hearing

OPIC notes that some hazardous waste permit renewals do not provide the opportunity for a contested case hearing. However, this is not such a renewal. A right to a hearing exists where an application to renew a permit for the storage or processing of hazardous waste includes waste generated from off-site.¹ SafetyKleen proposes to accept commercial waste from off-site generators, and, therefore, a right to hearing exists on the application and draft permit. However, the issues that may be raised in the context of this renewal and major amendment related to capacity are very limited, as described below.

B. Affected Person Analysis

TCEQ received four hearing requests on the application and draft permit from the following people: E. Parks Olmon and Delores Olmon, Joy Powell, Citizens for Healthy Growth, and Dee Wooten. Each of the hearing requestors have a personal justiciable interest related to a legal right affected by this application. The hearing requestors' interests regarding health and safety, water quality, and compliance history combined with the proximity of their properties to the proposed facility support a finding that they are "affected persons."² The hearing requestors state that they live within the following approximate distances from the facility: E. Parks Olmon

¹ 30 TAC § 55.201(i)(4) (2007); 30 TAC § 305.65(a)(8) (2007).

² 30 TAC § 55.203(c).

and Delores Olmon – 1 mile, Joy Powell – ¼ mile (individually and as a member of Citizens for Healthy Growth), Dee Wooten – ½ mile. The ED's map confirms that Joy Powell and Dee Wooten live well within one mile of the facility, and E. Parks Olmon and Delores Olmon live just outside one mile of the facility.³

In addition, the hearing requestors state concerns protected by the law under which the application will be considered,⁴ including the risks to human health and safety issues,⁵ nuisance,⁶ water quality,⁷ and compliance history.⁸ The requestors' interests reasonably relate to the potential effects of hazardous industrial and municipal solid waste management activities.⁹ In addition, the hearing requestors' properties are in close proximity to the facility, which also

³ Notably, the hearing requestors refer to a Risk Management Plan by SafetyKleen that establishes a 2.4 mile vulnerability zone. *See also* 40 CFR §§ 264.50-264.56 (relating to contingency plans).

⁴ 30 TAC § 55.203(c)(1).

⁵ 40 CFR § 264.31(2007); 30 TAC § 335.4 (2007) (stating that no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste...in such a manner so as to cause...(3) the endangerment of the public health and welfare”).

⁶ 30 TAC § 305.50(a)(2) (2007) (requiring Applicants for a permit to “store, process, or dispose of solid waste” to provide “[p]lans and specifications for the construction and operation of the facility” that are “sufficiently detailed and complete to allow the executive director to ascertain whether the facility will be constructed and operated in compliance with all pertinent state and local air, water, public health, and solid waste statutes); 30 TAC § 335.4(2) (2007) (stating that no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste...in such a manner so as to cause...(2) the creation and maintenance of a nuisance”).

⁷ 30 TAC § 335.4(1) (2007) (stating that no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste...in such a manner so as to cause...(1) “the discharge or imminent threat of discharge of industrial solid waste or municipal hazardous waste into or adjacent to the waters of the state without obtaining specific authorization for such a discharge”); 30 TAC § 335.204(a) (2007) (relating to unsuitable site characteristics for storage or processing facilities).

⁸ 30 TAC § 60.1(a) (2007); 30 TAC § 60.3(a) (2007).

⁹ 30 TAC § 55.203(c)(3).

shows a reasonable relationship between the interests stated and the activity regulated.¹⁰

Furthermore, nuisance conditions may affect the hearing requestors' health and their use of their property,¹¹ and inadequate containment facilities and waste spills may adversely affect their use of any impacted natural resource.¹²

Citizens for Healthy Growth ("CHG") name each of the individual hearing requestors as members. CHG states that it seeks to protect environmental and public health interests raised in public comment. Therefore, several members of the group would otherwise have standing to request a hearing in their own right; the interests the group seeks to protect are germane to the organization's purpose; and the issues raised in CHG's hearing request do not necessarily require the participation of individual members. Therefore, CHG has demonstrated affected person status.¹³

Therefore, OPIC recommends that the Commission find that E. Parks Olmon and Delores Olmon, Joy Powell, Citizens for Healthy Growth, and Dee Wooten are affected persons entitled to a hearing.

C. Issues Analysis

The hearing requests raise the following issues:

- 1) Will the facility adversely affect human health and the environment?
- 2) Will the facility adversely affect area water wells and surface water?
- 3) Will the facility comply with land use rules?
- 4) Will the facility comply with buffer zone requirements?

¹⁰ *Id.*

¹¹ 30 TAC § 55.203(c)(4).

¹² 30 TAC § 55.203(c)(5).

¹³ 30 TAC § 55.205(a).

- 5) Do the safety measures and contingency plan in the application and draft permit adequately address any risk to human health and the environment from the facility?
- 6) Should the Applicant conduct an environmental impact study?
- 7) Will the facility affect property values in the area?
- 8) Will the transport of wastes to the facility affect human health and the environment?
- 9) Do the application and draft permit contain adequate provisions regarding access to the facility?
- 10) Will the facility cause nuisance conditions?
- 11) Does the draft permit require adequate liability coverage and financial assurance?
- 12) Does the Applicant's compliance history warrant modification or denial of the requested permit?

1. The hearing requestors raise issues disputed by the parties.

No agreement exists between the parties on the issues enumerated above. The hearing requestors state that they are seeking a hearing "on every issue raised in public comment...[including] every issue to which the Executive Director responded." Therefore, the issues set forth above are disputed.¹⁴

2. The hearing requests raise issues also raised in comments on the application.

As stated above, the hearing requestors seek a hearing on each of the issues responded to by the ED. Therefore, the issues that were raised in the hearing requests were also raised during the public comment period.¹⁵

3. The hearing requestors raise issues of fact and several issues of law or policy.

The hearing requestors raise specific factual issues in their hearing requests about effects to human health and the environment, water quality, buffer zones, the adequacy of contingency

¹⁴ See 30 TAC § 50.115(c)(1); 30 TAC §§ 55.201(d)(4), 55.209(e)(2), and 55.211(c)(2)(A).

¹⁵ 30 TAC §§ 55.201(c), (d)(4); 55.211(c)(2)(A).

plans, access to the facility, financial assurance, and compliance history. As these are issues of fact, rather than issues of law or policy, these issues are appropriate for referral to hearing.¹⁶

However, the requestors also raise several issues of law or policy regarding land use, environmental impact studies, and transport of wastes. The requestors contend that the Applicant should have to comply with land use rules applicable only to *new* hazardous waste storage and processing facilities.¹⁷ The requestors also believe an environmental impact study should be conducted¹⁸ and that contingency plans for the transport of wastes should be included in the application and permit.¹⁹ Each of these issues can be resolved by the Commission without the fact-finding assistance of the SOAH. Therefore, these issues are not appropriate for referral to SOAH.

4. The issues raised regarding human health and the environment, water quality, buffer zones, contingency plans, access, nuisance, and compliance history are relevant and material to the Commission's decision on this application.

The hearing requestors raise several issues which are relevant and material to the Commission's decision on this application, and other issues that are not relevant and material under the requirements of 30 TAC sections 55.201(d)(4) and 55.211(c)(2)(A). Regarding the renewal, the Commission may deny a renewal permit if it is found that:²⁰

¹⁶ 30 TAC § 55.211(b)(3)(A), (B).

¹⁷ 30 TAC § 335.205(a) (2007).

¹⁸ The National Environmental Policy Act (NEPA) requires all federal agencies, when proposing actions that will significantly affect the environment, prepare Environmental Impact Statements (EIS) and provide copies of the EIS to the public for comment. 42 U.S.C.A. § 4331, *et seq.* Though many states have similar statutes requiring environmental impact statements at the state level, Texas does not have any such law.

¹⁹ Transport of wastes is regulated under separate authorization mechanisms.

²⁰ THSC § 361.089(e) (2006).

- (1) the applicant or permit holder has a compliance history that is in the lowest classification under Sections 5.753 and 5.754, Water Code, and rules adopted and procedures developed under those sections;
- (2) the permit holder or applicant made a false or misleading statement in connection with an original or renewal application, either in the formal application or in any other written instrument relating to the application submitted to the commission, its officers, or its employees;
- (3) the permit holder or applicant is indebted to the state for fees, payment of penalties, or taxes imposed by this title or by a rule of the commission; or
- (4) the permit holder or applicant is unable to ensure that the management of the hazardous waste management facility conforms or will conform to this title and the rules of the commission.

In addition, before the Commission can deny a renewal, it must find either that the Applicant's compliance history is in the lowest classification or that the Applicant is indebted to the state.²¹ However, these statutory provisions relate only to denial, and the Commission may, as the result of a contested case hearing, amend or modify the draft permit, suspend the authority to conduct an activity or dispose of waste for a specified period of time, or take other appropriate action.²² Therefore, in accordance with THSC section 361.081(e)(4), issues raised regarding human health and the environment,²³ water quality,²⁴ contingency plans,²⁵ access,²⁶ and

²¹ THSC § 361.089(f) (2006).

²² 30 TAC § 50.117(a) (2007).

²³ 30 TAC § 335.4(3) (2007).

²⁴ 30 TAC § 335.4(1) (2007) (stating that no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of industrial solid waste...in such a manner so as to cause:...(1) "the discharge or imminent threat of discharge of industrial solid waste or municipal hazardous waste into or adjacent to the waters of the state without obtaining specific authorization for such a discharge").

²⁵ 30 TAC § 335.153; 40 CFR §§ 264.50-264.56 (2007).

²⁶ Final Draft Permit Provision III.C., VIII.A.

nuisance²⁷ as they relate to the Applicant's management of the facility are relevant and material to the Commission's decision on the renewal application. Compliance history also may be considered for purposes of changes to the permit or denial.²⁸

In regards to the capacity expansion amendment application, the substantive issues for consideration are even further limited. The statute allows consideration of the waste stream,²⁹ but this issue did not appear to be raised in comment or in the hearing requests. The only other substantive law OPIC has identified in relation to amendments for capacity expansion involves faults within 3,000 feet of the facility, which relates to groundwater protection.³⁰ Therefore, the hearing requestors' concerns with contamination of their water wells poses an issue relevant and material to the Commission's decision on the major amendment.

5. OPIC recommends that the Commission refer the issues regarding human health and the environment, water quality, contingency plans, access, and compliance history to SOAH.

In light of the requirements of 30 TAC sections 50.115(b) and 55.211(b)(3)(A)(i), OPIC recommends that any referral to the State Office of Administrative Hearings ("SOAH") include the issues listed below.

- 1) Will the facility's management adversely affect human health and the environment?
- 2) Will the facility's management adversely affect area water wells and surface water?

²⁷ 30 TAC § 335.4(2) (2007).

²⁸ THSC § 361.089(f), (g) (2006).

²⁹ THSC § 361.0871(a) (2006).

³⁰ 30 TAC § 305.50(a)(4)(F) (2006).

- 3) Do the safety measures and contingency plan in the application and draft permit adequately address any risk to human health and the environment from the facility?
- 4) Do the application and draft permit contain adequate provisions regarding access to the facility?
- 5) Will the facility cause nuisance conditions?
- 6) Does the Applicant's compliance history warrant modification or denial of the requested permit?

D. OPIC Estimates that the Maximum Expected Duration of Hearing will be Nine Months.

Commission rule 30 TAC section 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 no hearing shall proceed longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. In assisting the Commission to state a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC section 55.209(e)(7), OPIC estimates that the maximum expected duration of hearing on this application would be nine months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

For the reasons set forth above, the Office of Public Interest Counsel respectfully recommends that the Commission grant the contested case hearing requests of E. Parks Olmon and Delores Olmon, Joy Powell, Citizens for Healthy Growth, and Dee Wooten, and refer this matter to the State Office of Administrative Hearings for a hearing on the issues described above.

Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
Emily A. Collins

Assistant Public Interest Counsel

State Bar No. 24045686

P.O. Box 13087 MC 103

Austin, Texas 78711

(512) 239-6363 PHONE

(512) 239-6377 FAX

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2008, the original and eleven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail or by deposit in the U.S. Mail.



Emily A. Collins

MAILING LIST
SAFETY-KLEEN SYSTEMS, INC.
TCEQ DOCKET NO. 2006-1904-IHW

FOR THE APPLICANT:

Ken Dobias
Safety-Kleen Systems, Inc.
1722 Cooper Creek Rd.
Denton, Texas 76208-1000
Tel: (940) 483-5251
Fax: (940) 483-5279

Jean M. Flores
Guida Slavich & Flores
750 N. Saint Paul St., Ste. 200
Dallas, Texas 75201-3205

FOR THE EXECUTIVE DIRECTOR:

Dawn Burton, Staff Attorney
Texas Commission on Environmental Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-0600
Fax: (512) 239-0606

Jocelyn H. Archuleta
Texas Commission on Environmental Quality
Waste Permits Division, MC-130
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6614
Fax: (512) 239-2007

FOR OFFICE OF PUBLIC ASSISTANCE:

Bridget Bohac, Director
Texas Commission on Environmental Quality
Office of Public Assistance, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4000
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE
RESOLUTION:

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-4010
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

LaDonna Castañuela
Texas Commission on Environmental Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3300
Fax: (512) 239-3311

REQUESTERS:

Delores & E. Parks Olmon
4401 E. University Drive
Denton, Texas 76208-1219

Joy Powell
3501 Mingo Road
Denton, Texas 76208-3894

Edward B. Soph, President
Citizens for Healthy Growth
1620 Victoria Drive
Denton, Texas 76208-1378

Dee Wooten
3103 Twilight Drive
Denton, Texas 76208-1018