

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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2008 MAR 10 PM 4:32
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March 10, 2008

REPLY TO RESPONSES TO REQUEST FOR CONTESTED CASE HEARING

Ms. LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, TX 78711-3087

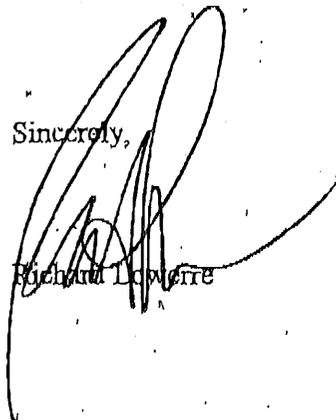
Subject: Application of Safey-Kleen Systems, Inc for Hazardous Waste Permit Renewal and Major Amendment Permit No. 50163 TCEQ Docket No. 2006-1904-IHW -

Dear Ms. Castañuela:

On behalf of Citizens for Healthy Growth ("CHG") and the other Protestants named in the attached I am filing this reply to the responses to the requests for a contested case hearing filed by CHG and the other individuals on the above-referenced application.

Enclosed are the original and 12 copies of this letter and request. Please file stamp the copy and return it to the courier.

Thank you for your assistance.

Sincerely,

Richard Lowerre

Enclosures
Cc: Service List
Ed Soph, President, Citizens for Healthy Growth
E. Parks and Dolores Olmon
Joy Powell
Dee Wooten

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

TCEQ DOCKET NO. 2006-1904-IHW

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IN THE MATER 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 CHIEF CLERKS OFFICE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

REPLY TO THE RESPONSES TO THE HEARING REQUESTS OF PROTESTANTS & MOTION TO STRIKE

TO THE HONORABLE COMMISSION:

COMES NOW Citizens for Healthy Growth, E. Parks and Dolores Olmon, Joy Powell and Dee Wooten ("Protestants") and file this, their reply to the responses by the Executive Director, Applicant and OPIC to the requests for hearing and their motion to strike the arguments of the Applicant regarding mediation, in support thereof, would respectfully show the following:

I. SUMMARY

Summary Reply In Support of the Responses of the Executive Director and OPIC:

With the exception of how certain issues are characterized and limited, Protestants agree with the responses of the Executive Director and OPIC. Protestants agree with the determination that all hearing requestors qualify as affected persons and that a reasonable schedule is nine months for the hearing process. The matter of issues will be discussed below.

Summary Reply in Opposition to the Applicant's Response: Applicant's response to

Protestant's hearing request was without merit and mischaracterizes the facts. As explained below, Applicant's entire response related to the Protestants should simply be rejected.

Summary of Protestants' Motion to Strike Applicant's Improper Characterization of the Confidential Settlement Mediation Processes: In Section VI of Applicant's response to Protestant's hearing request, Applicant not only improperly discusses the activities and positions of Protestants and the Applicants in their efforts to settle or mediate this matter, Applicant improperly characterizes Protestants' activities and positions. The ability of this Commission and Texas courts to rely upon confidential discussions in settlement and mediation is critical to the efficient resolution of many conflicts. The Commission should use this opportunity to take appropriate actions to reconfirm its policy on such matters and to assure that Applicant is put at risk if it repeats these mistakes.

II. ISSUES

Given that TCEQ provides no guidance on potential issues or how to present comments or issues in a permit proceeding, there is always the risk that TCEQ will fail to understand or will misunderstand a public comment. This problem is exacerbated by efforts to reduce a set of comments to simply one-sentence issues.

Here, for example, for comments on risks to water, the Executive Director and OPIC characterize the issue differently:

ED: Does the draft permit protect groundwater quality? Does the draft permit protect surface water quality? (Emphasis added)

OPIC: Will the facility's management adversely affect area water wells and surface water? (Emphasis added)

Both characterizations of the comments could be read as more limiting than the comments (oral and written) that raised issues of contamination of groundwater. The ED's characterization indicates that the focus is the permit, not the application, site conditions or other factors that can

affect the ability of a permittee to protect groundwater. OPIC's characterization indicates that the issue is limited to "management" and to "water wells," rather than groundwater.

A characterization of the issue is more properly,

"Will ground and surface water be protected by the final decision of TCEQ?"

Protestants are not suggesting that either the ED or OPIC intended to limit the issue. More care is simply needed because TCEQ lacks standard language. It must be noted, however, that SOAH judges do attempt to limit issues in ways referred by the Commissioners in their interim orders. Thus, in a recent landfill case, an issue of destruction of wetlands by proposed landfill actions was characterized by the Executive Director and the Commission interim order as destruction of wetlands "within the footprint of the landfill." The issue was probably characterized in that limited way because of language in one section of TCEQ's rules, however, the law and rules require consideration of the need for protection of wetlands whether inside or outside of the footprint of the landfill, as other activity, including parking lots and storage of cover materials, could be done at the site of a wetland. SOAH recommended denial of the landfill based on destruction of wetlands at the site, but the Commissioners reversed on that issue, since they had limited the issue to wetlands within the footprint!

The issues, as Protestants believe are properly characterized from the comments, are provided as Attachment 1. Discussion of a few of the issues listed in Attachment 1 is provided as examples for the larger set of issues.

Compliance History: OPIC recommends the issue of whether "the compliance history warrants modification or denial of the permit. The ED's recommendation of the issue is more limited, focusing on denial, but not modifications. OPIC's approach is the proper one.

Human Health and the Environment: OPIC recommends the issue, "Will the facility's management adversely affect human health and the environment?" The ED does not have a similar issue. The issue was clearly raised in oral and written comments. For example on Attachment 2, Ed Soph, President of Protestant CHG, raises the issue in the fourth and last paragraph. In the fifth paragraph, Mr. Soph acknowledges correctly that no "Environmental Impact Statement" (EIS) is required, but notes that any evaluation of environmental or health impacts done for the facility in 1994 under Texas law and TCEQ rules does not address the increased risks of current conditions, such as increased population, increased waste acceptance, etc. It is not the EIS document that Mr. Soph seeks but the assessment of impacts under TCEQ's rules.

The ED characterized the issue as one of whether an environmental impact study is required. There were a number of comments about the need for an environmental impact study, statement or report. The point of the comments, however, is, again, not whether some formal document is required or was prepared but whether the potential impacts have been assessed and whether the assessment assures protection of public health and the environment. Any assessment would need to be limited to the scope of TCEQ's rules, but those rules clearly require assessments of impacts on public health and the environment, although not as extensively as might be required in a Federal EIS. Thus, OPIC's issue as redrafted on Attachment 1 should be referred.

Access: OPIC recommends the issue of whether there are adequate provisions for limiting access to the facility. The ED does not. Yet, it is clear that the issue was raised. See for example the comments of Ed Soph, President of Protestant CHG, of March 15, 2006, paragraph 7, provided as Attachment 2.

Nuisance: OPIC recommends the issue of whether “the facility will cause nuisance conditions.” The ED does not. The ED does recommend the issue of the sufficiency of the odor controls, but recommends against the issue of impacts of noise. OPIC’s recommendation is the proper one since several nuisance issues were raised, including odors, dust and other allergy-causing releases, noise and light from late night operations, etc. SOAH can determine the extent to which nuisance issues are relevant under TCEQ’s rules.

Buffers and Financial Assurance: The ED recommends referring the adequacy of both the financial assurance and buffers. OPIC states that these “are issues of fact, rather than issues of law or policy, ... appropriate for referral to hearing,” OPIC, however, does not then list the issues with their list of recommended issues. Protestants assume that is an oversight or error.

III. PROTESTANTS’ REPLY TO APPLICANT’S RESPONSE

A. Applicant’s Response to the Hearing Requests: Applicant has chosen to take positions it knows are not reasonable. It has, for example, argued that because the ED disagrees with the Protestants on the facts in the ED’s response to comments, the comments must be rejected! (See Applicant’s response pages 6 & 7.) That is clearly not correct. The hearing is held because there are factual disagreements and the Commission cannot assume the ED is correct. A hearing is required to allow Protestants to present their evidence and expert opinions on such facts as adequacy of the contingency plan.

Applicant has also chosen to oppose parties who Applicant knows are affected persons. One Protestant (Ms. Powell) is the closest resident, right across Mingo Road from Applicant’s facility. That Protestant states that she is a member of CHG.

Applicant then tries to divert the Commission’s attention by claiming the only real concerns of those requesting a hearing are related to off-site evacuation in case of catastrophic

events. Neither the comments nor hearing requests support this position. Moreover, whether or not one issue is not relevant or the main concern does not relieve the Commission from referring other issues that are relevant.¹

Applicant also incorrectly argues that the individual Protestants are not affected parties because they only raise legal and policy issues. That is also not true. Moreover, a Protestant is not limited to the issues raised by that Protestant. All issues raised and not withdrawn can be the basis of valid hearing requests and, if so, these issues must be referred to SOAH. The hearing requests of every Protestant properly requests referral to SOAH of "every issue raised in public comments." Clearly, the ED and OPIC have identified relevant and material factual disputes that were raised in public comments and never withdrawn.

Next, the Applicant claims that CHG is not an affected party because it did not identify its members who were affected in its hearing request. Yet the three individual Protestants each identified themselves as a member of CHG in their hearing request.

Finally, the Applicant claims that there is no relief that would satisfy Protestant's concern. That is also clearly wrong. Denial of the application (with the resulting closure of the facility) would satisfy Protestants. Protestants, however, understand that denial of a renewal is not likely. They do expect TCEQ to require a better contingency plan, include improved safety measures, etc. CHG and its members are not new to TCEQ permit hearings. One member had to take an appeal to the Texas courts to reverse a TCEQ denial of his hearing request. (This was before this Commission had gained experience with the changes in Texas law at the time and

¹ *Mary Louise Holton v. TNRCC et al*, Cause No.97-06408, District Judge Joe Hart reversing a TNRCC order issuing a discharge permit to the City of Sherman and denying a hearing. TNRCC argued that despite having one valid basis for a hearing (water quality concerns) the person requesting the hearing's primary interest was the problem of flooding, an issue that TNRCC could not resolve in the hearing. Court rejected TNRCC's effort to create a new standing test that would have allowed TNRCC to deny hearings in the primary concern was not relevant even if the relevant concern was a very significant concern.

before it had the clear guidance from Texas courts on handling hearing requests and defining "affected persons.") Applicant knows this, yet it is urging TCEQ to make a similar mistake in direct conflict with the decisions of Texas courts.²

IV. PROTESTANTS' MOTION TO STRIKE

Applicant concludes its Response by submitting selective and misleading settlement negotiation correspondence and by making false and irrelevant accusations against Protestants that appear to violate Texas law protecting the confidentiality of settlement negotiations.

Applicant seems to want the Commission to consider the parties' conduct relating to mediation as part of its decision on the hearing requests. Protestants will not be drawn into responsive tit-for-tat evidence and accusation regarding this irrelevant and improper matter and do not believe the Commission should involve itself either.

"Evidence of conduct or statements made in compromise negotiations is ... not admissible." Tex. R. Evid. 408. "The manner in which participants negotiate should not be disclosed to the trial court." *In re Acceptance Ins. Co.*, 33 S.W.3d 443, 453 (Tex. App. — Fort Worth 2000). The Texas Civil Practice and Remedies Code additionally contains a general prohibition against the disclosure of mediation information, which "may not be used as evidence against the participant in any judicial or administrative proceeding." Tex. Civ. Prac. & Rem. Code § 154.073(a).

Protestants have sought and continue to seek a resolution of the matter through settlement or mediation, in spite of Applicant's surprising effort to undermine the negotiation process by making baseless accusations to the Commission about Protestants' negotiation approach. If the Commission wishes to undertake any consideration of the conduct of Protestants in mediation in this case, the Commissioners should ask the TCEQ mediators whether they have seen anything

² A summary of the cases that have provided TCEQ clear guidance on hearing requests is provided as Attachment 3.

that would lead them to believe that Protestants have mediated in bad faith. Otherwise, Protestants urge the Commissioners to strike and ignore the language in Section VI, pages 26-28 of the Applicant's response to hearing requests.

V. CONCLUSION & PRAYER

As the Executive Director and OPIC have correctly explained, all Protestants are affected parties and there are proper issues for referral to SOAH. A hearing of 9 months is appropriate given the complexity of the issues.

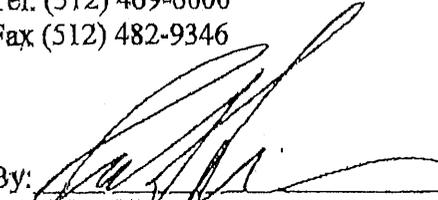
Applicant's response is not only without merit, it improperly characterizes Protestants' actions and position in confidential settlement discussions and mediation. It mischaracterizes Texas law and TCEQ's rules and policy. The entire response should be rejected, and parts stricken.

WHEREFORE, Protestants urge the Commission to

- 1) grant the hearing request of all Protestants,
- 2) refer the issues listed on Attachment 1 to SOAH,
- 3) set the hearing schedule for nine months, and
- 4) strike Section VI from the response of Applicant.

Respectfully Submitted,

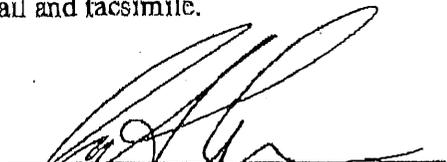
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By: 
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Certificate of Service

I certify that on March 10, 2008, a true and correct copy of the foregoing **REPLY OF PROTESTANTS TO RESPONSES TO HEARING REQUEST and MOTION TO STRIKE** was served upon the parties identified below by first class mail and facsimile.


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ATTACHMENT A

ISSUES FOR REFERRAL TO SOAH

Where the language of the proposed issue below is exactly or very similar to one proposed by the ED or OPIC, that will be indicated along with the number of the proposal.

1) Public Health and the Environment:

Will human health and the environment be properly protected by the final decision of TCEQ? (OPIC 1) (Also see OPIC 2 and ED 3 on their list of issues not recommended.)

2) Protection of Ground and Surface Water:

"Will ground and surface water be properly protected by the final decision of TCEQ?" (ED 1 & 2, OPIC 2)

3) Air Pollution:

Does the application and draft permit satisfy the regulatory requirements for air emissions under the hazardous waste rules? (ED 10)

4) Buffer Zone and Facility Design:

Do the facility buffer zone, tank locations and other waste management units satisfy the regulatory requirements? (ED 3)

5) Access to Facility:

Do the application and draft permit contain adequate provisions regarding access to the facility? (OPIC 4)

6) Staffing:

Do the provisions for staffing and staff training in the application satisfy regulatory requirements? (ED 4)

7) Safety and Contingency Planning:

Do the security measures and contingency plan in the application satisfy the regulatory requirements? (ED 5 & 6, OPIC 3)

8) Financial Assurance:

Do the provisions for financial assurance and liability insurance in the application and draft permit satisfy the regulatory requirements? (ED 7)

9) Compliance History:

Does the Applicant's compliance history warrant modification or denial of the requested permit? (OPIC 6, ED 8)

10) Nuisance Conditions:

Will the facility cause nuisance conditions? (OPIC 5, ED 9 [limited to odors])

11) Land use Limitations:

Do TCEQ rules prohibit this existing, permitted commercial industrial hazardous waste management facility from renewing or amending its permit because of land use restrictions due to parks, daycare centers, schools, churches, residences or other activities within one-half mile of the facility? (ED 2 on the ED's list of issues not recommended.)

ATTACHMENT B

ATTACHMENT C

***SUMMARY OF COURT CASES INVOLVING DECISIONS BY TNRCC (NOW TCEQ)
TO DENY HEARING REQUESTS***

There have been at least seven appeals of decisions by TCEQ's predecessor agency (TNRCC) to deny requests for hearing on permit applications involving water or air pollution or solid wastes. The state was reversed in each of these cases.

Save Barton Creek Assn. v. TNRCC et al., Cause No. GN 1000336. (District Judge Jenkins) Rejecting TNRCC's decision to deny a request for a contested case as not proving a factual basis for the hearing. Ordered TNRCC to refer the matter to SOAH for a contested case hearing on the merits or for a hearing to allow Plaintiff to present its evidence on the threshold standing issues. (Wastewater permit) Order dated September 2001. No appeal.

Grissom v. TNRCC, Cause No. 98-06046, (District Judge Cooper) Rejecting TNRCC's effort to require evidence to be submitted with the hearing request pleading and TNRCC's acceptance of the factual allegations of the applicant as true. Ordered TNRCC to refer the matter to SOAH for a hearing on the merits or for a hearing to allow the parties to present their evidence of standing. (Air pollution permit) Order dated February, 1999.

Affirmed, ***United Copper Ind. v. Grissom***, No. 03-99-00117-CV, (Tex. App.-Austin 2000)
Adding that a person requesting a hearing does not need to allege or prove that he or she will prevail, only the threshold tests of standing and reasonableness.

Sierra Club, et al. v. TNRCC, Cause No. 96-14766 (District Judge Davis) Holding that TNRCC's rules do not give fair notice that TNRCC would require more than basic factual pleadings on standing and that an opportunity to present evidence on the threshold issues is required before TNRCC can deny a hearing request that alleges sufficient facts. (Wastewater permit) Order dated Nov. '99. No appeal.

Sierra Club, et al. v. TNRCC, Cause No. 97-07501 (District Judge Davis) Same reasoning as in the case above. (Wastewater permit) Order dated Nov. '99. No appeal.

Keith Weaver v. TNRCC, Cause No. 98-04623 (District Judge Cooper) Rejecting TNRCC's position that it can deny a contested case hearing if the request for hearing does not provide details or "proof" of standing, but only provides brief allegations of standing. (Wastewater permit) Order dated May '99. No appeal.

Mary Louise Holton v. TNRCC et al., Cause No. 97-06408 (District Judge Hart) Rejecting TNRCC's position that the standing test allowed TNRCC to determine what was the requester's primary interest and reject a request for a contested case hearing even if other valid justiciable interests were alleged. (Wastewater permit) Order dated November '98. No appeal.

West Dallas Coalition for Envir. Justice v. TNRCC, Cause No. 96-05388 (District Judge Davis) .
Rejecting TNRCC's 1995 interpretation of the standing test as "absurd." (Solid waste permit) Order dated May '97.

Affirmed ***Heat Energy Ad v. West Dallas Coalt.***, 962 S.W.2d 288 (Tex. App.-Austin 1998)
Holding that the burden for proving standing is a threshold test, not a test involving the merits of the permit.

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FAX NUMBER TRANSMITTED TO:

To: TCEQ Chief Clerk (512) 239-3311

From: Richard Lowerre

DOCUMENTS	NUMBER OF PAGES (not including cover page)
Reply to Responses to Hearing Requests in TCEQ Docket No. 2006-1904-IHW, Application of Safety-Kleen	17

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- HDW*