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Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 29, 2014

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

**RE: ASCEND PERFORMANCE MATERIALS TEXAS INC.
TCEQ DOCKET NO. 2014-1189-IHW**

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script, reading "Isabel Segarra".

Isabel G. Segarra Treviño, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2014-1189-IHW

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION OF ASCEND	§	
PERFORMANCE MATERIALS	§	TEXAS COMMISSION ON
TEXAS INC. FOR A TEN-YEAR	§	
RENEWAL AND MAJOR	§	ENVIRONMENTAL QUALITY
AMENDMENT OF IHW PERMIT AND	§	
COMPLIANCE PLAN NO. 50189		

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

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. INTRODUCTION

a. Background of Facility

Ascend Performance Materials Texas Inc. (Applicant or Ascend) submitted an application to the TCEQ on July 13, 2010 for a ten-year renewal and major amendment to authorize the construction and operation of one proposed landfill and one proposed container storage area for the storage, processing, and disposal of hazardous, Class 1, and Class 2 industrial solid waste. The renewal requests continued authorization for operation of two container storage areas, two tanks, one active landfill, two boilers, and one thermal desorption unit for the storage, processing, combustion, and disposal of hazardous, Class 1, and Class 2 industrial solid waste. Additionally, the renewal requests post closure care of one closed landfill and one closed surface impoundment. Ascend has also applied for a Compliance Plan renewal to authorize and require Ascend to monitor the concentration of hazardous constituents in groundwater and remediate groundwater quality to specified standards.

Ascend currently operates a chemical manufacturing plant which produces solid waste, including hazardous waste, and wastewater. The facility is located on FM 2917, approximately 11 miles southeast of the City of Alvin in Brazoria County, Texas. The facility is adjacent to other industrial operations and is approximately 2,514 acres in size. The facility is sited within the drainage area of Segment 1107 of the San Jacinto-Brazos Coastal Basin (North Latitude 29°15'21", West Longitude 95°12'37"). The facility is located in an area subject to the Texas Coastal Management Program and is also within a 100-year flood plain.

b. Procedural Background

The Executive Director (ED) declared the application administratively complete on July 30, 2010. On August 22, 2010, the Applicant published a Notice of Receipt of Application and Intent to Obtain Permit/Compliance Plan Renewal and Major Amendment (NORI) in the *Houston Chronicle*, a newspaper in general circulation in Brazoria County, Texas. On April 3, 2014, the Applicant published a Notice of Application and Preliminary Decision (NAPD) in the *Houston Chronicle*. Bilingual publication was not required for this application. The public comment period ended on May 19, 2014. A request for a public meeting was denied on July 17, 2014. A Compliance History Report for the last five years was prepared on February 3, 2014 and lists Ascend as a "satisfactory" performer. The ED issued a Response to Public Comment (RTC) on July 17, 2014 and made no changes to the application. The request for reconsideration and request for hearing period ended on August 21, 2014 and the TCEQ received one timely hearing request from Mr. Dick Tyson on April 21, 2014.

As discussed below, OPIC recommends that the Commission deny Mr. Tyson's hearing request because it fails to demonstrate that Mr. Tyson is an affected person.

II. APPLICABLE LAW

The ED declared this application administratively complete on July 30, 2010. This application was declared administratively complete after September 1, 1999, and is therefore subject to the procedural requirements adopted pursuant to House Bill 801 (76th Leg., 1999). 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 TEX. ADMIN. CODE (TAC) § 55.201(d).

Under 30 TAC § 55.203(a), an "affected person" is "one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application." 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). OPIC notes that in certain industrial hazardous waste permit renewals there is no right to a contested case hearing. 30 TAC § 55.201(i)(4). There is an opportunity for a hearing on this application because Ascend has applied for a permit renewal and a major amendment.

III. DISCUSSION

a. Determination of Affected Person Status

TCEQ received one hearing request from Dick Tyson. As indicated on the ED's map, Mr. Tyson's residence is approximately ten miles from the Ascend facility. However, Mr. Tyson bases his hearing request on his recreational use of Mustang Bayou, Chocolate Bayou, and Chocolate Bay – all are bodies of water closer to the facility than Mr. Tyson's home. Chocolate Bayou runs approximately one mile southwest of the facility. OPIC finds that Mr. Tyson substantially complied with the procedural hearing request requirements set out in 30 TAC §

55.201(d). However, considering the factors listed in 30 TAC § 55.203(c), OPIC cannot find that Mr. Tyson is an affected person.

The interest claimed is one protected by the law under which the application will be considered. Mr. Tyson is concerned about surface water and groundwater contamination in the Mustang Bayou, Chocolate Bayou, and Chocolate Bay and how this will affect his fishing and boating. While Ascend has not applied for a wastewater discharge permit, significant portions of the permit are dedicated to the protection of surface water and groundwater. The ED notes in Response to Comment No. 1, addressing groundwater and surface water quality, that the permit prohibits surface water discharges, requires storm water management, prohibits groundwater contamination, requires a containment system for leakage from the container storage area, details procedures for spills, requires leachate collection and leak detection, and requires groundwater monitoring, amongst other surface water and groundwater protections. OPIC finds that these permit conditions indicate that surface water and groundwater protection are integral to Ascend's industrial hazardous waste permit. Waters of the State and waters of the United States cannot be owned by individuals because they are held in trust by the states for the benefit of the people. *See Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892). Mr. Tyson is not required to own property in the Chocolate Bay bayou system to assert an impacted recreational use because Mr. Tyson cannot own the natural resource he claims is affected.

While the interest claimed relates to the law under which the application is to be considered, Mr. Tyson has not articulated that a reasonable relationship exists between the interest claimed and the activity regulated. Mr. Tyson states that he is concerned about industrial activity, leakage, and runoff of hazardous waste threatening to impact the Chocolate Bay bayou system and affecting his enjoyment of boating, fishing, and other recreational activities. The

permit Ascend intends to renew and amend is specifically for the manufacture of: Acrylonitrile (AN), Diphenyl Oxide (DPO), Formalin, Iminodiacetic Acid (IDA), Methionine Hydroxy Butanoic Acid (MHBA), Nitrilotriacetic Acid (NTA), Linear Alkyl Benzene (LAB), and Sodium Cyanide (NaCN). Mr. Tyson's hearing request does not relate these chemical feedstocks and intermediates, or their manufacture, to his recreational interest. Further, given that the Ascend facility is one of many industrial operations near the Chocolate Bay bayou system, OPIC cannot find that Mr. Tyson's hearing request articulates how potential leakage and runoff from Ascend's facility will impact Mr. Tyson's recreational use.

Mr. Tyson does not list health and safety concerns, or concerns about the use of his property in his hearing request. Mr. Tyson does not articulate the impact of Ascend's activities on the bayou system and how his recreational use interest would be impacted. OPIC finds that Mr. Tyson has not shown the likely impact of the regulated activity on his health and safety, on his use of property, and on his use of the impacted resource.

Based on the factors set forth in 30 TAC § 55.203(c), OPIC cannot find that Mr. Tyson is an affected person. In the event the Commission disagrees and finds that Mr. Tyson is an affected person, OPIC provides further analysis below concerning the issues raised in the request.

b. Issues Raised During the Public Comment Period

Mr. Tyson's hearing request was filed during the comment period; therefore, all of the issues raised in the hearing request were raised in the comment period and have not been withdrawn. 30 TAC §§ 55.201(c), (d)(4), 55.211(c)(2)(A).

c. Disputed Issues

There is no agreement between the hearing requestor and the ED on the issues raised in the hearing requests.

d. Issues of Fact

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. 30 TAC § 55.211(c)(2)(A). The issues presented concerning surface water and groundwater quality are issues of fact.

e. Relevant and Material Issues to the Decision on the Application

The hearing request raises issues relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). To refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (1986).

TCEQ is responsible for the protection of water quality under Chapter 26 of the Texas Water Code and 30 TAC Chapters 305 and 307, as well as under specific rules related to industrial hazardous waste found at 30 TAC Chapters 305 and 335. The Texas Surface Water Quality Standards in 30 TAC Chapter 307 require the proposed permit "maintain the quality of water in the state consistent with public health and enjoyment." 30 TAC § 307.1. Therefore, Mr. Tyson's concerns relating to adverse impacts on the water quality in the Chocolate Bay bayou system are relevant and material.

f. Issues Recommended for Referral

If the Commission grants Mr. Tyson a hearing, OPIC recommends that the following disputed issue of fact be referred to SOAH for a contested case hearing: Whether the proposed permit renewal and major amendment will adversely impact the surface water and groundwater quality in Chocolate Bay and the Chocolate Bay bayou system.

g. Maximum Expected Duration for the Contested Case Hearing.

Commission Rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that no hearing shall be longer than one year from the first day of the preliminary hearing to the date the proposal for decision is issued. To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

OPIC recommends denying Mr. Dick Tyson's hearing request because it fails to demonstrate that he is an affected person. However, if the Commission decides to refer this matter to SOAH, OPIC recommends the Commission refer the following issue: whether the proposed permit renewal and major amendment will adversely impact surface water and groundwater quality at Chocolate Bay and the Chocolate Bay bayou system.

Respectfully submitted,

Vic McWherter
Public Interest Counsel



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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2014, the original and seven 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.


Isabel G. Segarra Treviño

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TCEQ DOCKET NO. 2014-1189-IHW

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