

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *Commissioner*
Jon Niermann, *Commissioner*
Richard A. Hyde, P.E., *Executive Director*



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 28, 2015

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: FORMOSA UTILITY VENTURE, LTD. &
FORMOSA PLASTICS COPORATION, TEXAS
TCEQ DOCKET NO. 2015-1528-IWD**

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 black ink, appearing to read "Rudy Calderon".

Rudy Calderon, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2015-1528-IWD

**IN THE MATTER OF THE
APPLICATION OF FORMOSA
UTILITY VENTURE, LTD AND
FORMOSA PLASTICS
CORPORATION, TEXAS FOR
TPDES PERMIT
NO. WQ0002436000**

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL QUALITY**

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

To the Honorable Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of 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

Formosa Utility Venture, Ltd. and Formosa Plastics Corporation (Formosa or Applicant), which operates the Point Comfort Plant, a plastics and organic and inorganic chemicals manufacturing facility, has applied for a major amendment with renewal to TPDES Permit No. WQ0002436000 to establish minimum analytical levels for oil & grease, biochemical oxygen demand (5-day), free available chlorine, and titanium; reduce Lavaca Bay monitoring from quarterly each year to quarterly triennially based on 15 years of no impacts; increase the temperature limit at Outfall 001 from 95 degrees Fahrenheit (oF) to 100 oF; authorize the discharge of non-process area stormwater, hydrostatic test water, fire water, non-contact steam condensate, non-contact wash water, potable water, air conditioner unit condensate, and ash truck wash water on an

intermittent and flow variable basis via Outfall 013; increase the effluent limitations for total copper at Outfall 001; increase the effluent limitations for chloroform at Outfall 101 (proposed Outfall SUM); authorize the discharge of fire water via Outfalls 001, 101, and 201; create a summation outfall (designated as Outfall SUM) to regulate the effluents monitored via internal Outfalls 101 and 201; and authorize the discharge of fire water, potable water, and air conditioner unit condensate via Outfalls 001, 101, 201, 002, 003, 004, 005, 006, 007, 008, 009, 010, 011, and 012.

The existing permit authorizes the discharge of remediated groundwater and treated previously monitored effluents (via Outfalls 101 and 201) at a daily average flow not to exceed 9,700,000 gallons per day via Outfall 001; treated process wastewater, equipment/facility washdown, stormwater, and utility wastewaters at a daily average flow not to exceed 4,400,000 gallons per day via Outfall 101; treated and combined Ion Exchange Membrane (IEM) wastewater streams, utility wastewaters, equipment/facility washdown, stormwater, and water treatment wastewaters on a continuous and flow variable basis via Outfall 201; non-process area stormwater, hydrostatic test water, fire water, non-contact steam condensate, and non-contact wash water on an intermittent and flow variable basis via Outfalls 002, 003, 004, and 005; and non-process area stormwater, hydrostatic test water, fire water, non-contact steam condensate, and non-contact wash water on an intermittent and flow variable basis via Outfalls 006, 007, 008, 009, 010, 011, and 012.

The facility is located at 201 Formosa Drive, one-mile north of the intersection of State Highway 35 and Farm-to-Market Road 1593, northeast of the City of Point Comfort, Calhoun County, Texas 77978. The effluent is discharged via Outfall 001, through a pipeline to Lavaca Bay/Chocolate Bay; via Outfall 011 from the Dock Tank

Farm to a ditch, thence to a drainage pipe directing the flow to Point Comfort turning basin, thence to Lavaca Bay/Chocolate Bay in Segment 2453 of the Bays and Estuaries; via Outfalls 002, 003, 004, and 012 to unnamed ditches, thence to Cox Lake, thence to Cox Bay; via Outfalls 005, 006, 007, 008, 009, and 010 to Cox Lake, thence to Cox Bay; and via Outfall 013 directly to Cox Bay, in Segment No. 2454 of the Bays and Estuaries. The unclassified receiving waters have no significant aquatic life use for the unnamed ditches and high aquatic life use for Cox Lake. The designated uses for Segments 2453 and 2454 are exceptional aquatic life use, contact recreation, and oyster waters.

In accordance with 30 TAC § 307.5 and the TCEQ implementation procedures (January 2003) for the Texas Surface Water Quality Standards (TSWQS), an antidegradation review of the receiving waters was performed. A Tier 1 antidegradation review has preliminarily determined that existing water quality uses will not be impaired by this permit action. Numerical and narrative criteria to protect existing uses will be maintained. A Tier 2 review has preliminarily determined that no significant degradation of water quality is expected in Cox Lake, which has been identified as having high aquatic life use, or in Cox Bay or Lavaca Bay/Chocolate Bay, which have been identified as having exceptional aquatic life use.

B. Procedural Background

TCEQ received the application on February 2, 2010 and declared it administratively complete on April 7, 2010. The ED completed the technical review of the application on September 27, 2010 and prepared a draft permit. The draft permit was originally filed with the TCEQ Office of the Chief Clerk on June 9, 2011; it was remanded back to the Executive Director on August 31, 2011 for further technical review. The draft permit was re-filed with the TCEQ Office of the Chief Clerk on May 9,

2013. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published on April 28, 2010 in English in the *Port Lavaca Wave*, and on May 5, 2010 in Spanish in the *Revista de Victoria*. The Notice of Application and Preliminary Decision (NAPD) was published on June 12, 2013 in English in the *Port Lavaca Wave*, and on July 3, 2013 in Spanish in the *Revista de Victoria*. The initial public comment period ended on August 2, 2013. On June 10, 2015, the ED mailed the NORI to the landowners that are on the list Formosa submitted in 2015 that were not on the original landowner list. No additional comments were received. The ED's Response to Comments was mailed on August 17, 2015 and the deadline for filing a request for hearing was September 21, 2015.

II. Applicable Law

The ED declared this application administratively complete on April 7, 2010. Because 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 House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. WATER CODE (TWC) § 5.556).

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 TAC § 55.201(d).

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.”

30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. *Id.* Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons. *Id.* Relevant factors 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 and safety of the person, and on the 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).

A group or association may request a contested case hearing if:

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

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements. *Id.*

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 of 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).

III. Discussion

A. Determination of Affected Person Status

Union of Commercial Oystermen of Texas

According to the hearing request, the Union of Commercial Oystermen of Texas is an organization made up of shrimpers and oystermen who fish and/or earn a living in Lavaca/Chocolate Bay and other bays in the vicinity. The group contends that the bays, shrimp, and oysters will directly be affected by the wastewater discharge by Applicant and therefore their ability to earn a living will be affected.

The group has identified several members in its hearing request who the group contends would meet the criteria of being an affected person as laid out in 30 TAC §

55.203. Among those individuals named is Mauricio Blanco. According to the hearing request, Mr. Blanco lives at 714 S. San Antonio Street, Port Lavaca, Texas. According to a map generated by the ED and provided to OPIC, Mr. Blanca's residence is approximately 5.5 miles across Lavaca Bay from the Outfall. While Mr. Blanco resides more than 5 miles from the outfall, his job requires him to make use of areas much closer to the outfall and the facility than where his residence is located. Mr. Blanco catches and sells shrimp and other organisms from waters surrounding the outfall and facility and is concerned about potential impacts on his business and personal interests related to the bays surrounding Applicant. Economic interests are protected under the law governing this application and Mr. Blanco has demonstrated that he has an economic interest that is distinguishable from the interests of the general public. *TWC § 26.003; 30 TAC § 307.1; 30 TAC § 55.203(a)*

OPIC finds that the interests Union of Commercial Oystermen of Texas seeks to protect are germane to the organization's purpose. Further, Mr. Blanco is a member who has standing in his own right to request a hearing. Related to the impact on affected persons economic interests raised in this request the Commission must consider issues regarding water availability,¹ the protection of in stream uses,² and the protection of public welfare³ in its determination of whether to grant the application. A reasonable relationship exists between Mr. Blanco's interests in the quality of the water and the protection and health of the wildlife he relies on for a living and the proposed

¹ See TWC § 11.134(b); 30 TAC §297.42.

² TWC § 11.147(d).

³ TWC 11.134(b)(3)(C)

permit amendments sought by Applicant. OPIC therefore recommends that the hearing request of Union of Commercial Oystermen of Texas be granted.

San Antonio Bay Water Keeper

According to the hearing request, San Antonio Bay Water Keeper is a grassroots group committed to preserving and protecting the health of San Antonio, Lavaca, and Matagorda Bays and its watershed through advocacy, education, and enforcement of the Clean Water Act. The group contends that the health of the bays, wildlife, and the use and enjoyment of the bays and watershed will all be affected by the wastewater discharge by Applicant.

The group has identified several members in its hearing request who the group contends would meet the criteria of being an affected person as laid out in 30 TAC § 55.203. Among those individuals named is David Campos. According to the hearing request, Mr. Campos lives at 881 Hackberry Street, Port Lavaca, Texas. According to a map generated by the ED and provided to OPIC, Mr. Campos' residence is approximately 6.5 miles across Lavaca Bay from the Outfall. Although Mr. Campos resides more than 6 miles from the outfall and facility, currents and tides could facilitate the migration of discharged pollutants to his side of Lavaca Bay. Furthermore, Mr. Campos' use and enjoyment of the bays could be affected by the proposed discharges as it relates to boating, fishing, and all around use of the bays.

OPIC finds that the interests San Antonio Bay Water Keeper seeks to protect are germane to the organization's purpose. Further, Mr. Campos is a member who has standing in his own right to request a hearing. The Commission must consider

issues regarding water availability,⁴ the protection of in stream uses,⁵ and the protection of public welfare⁶ in its determination of whether to grant the application. A reasonable relationship exists between Mr. Campos' interests in the use and enjoyment of the bay, the quality of the water, and the protection and health of the wildlife and the proposed permit amendments sought by Applicant. OPIC therefore recommends that the hearing request of San Antonio Bay Water Keeper be granted.

Texas Injured Workers

According to the hearing request, Texas Injured Workers is an organization of current and former workers from local petrochemical, gas, and oil industries on the Texas Gulf Coast who advocate for health and safety protections in the workplace. Additionally, the groups hearing request states they also advocate for the beauty and recreational opportunities of the bays, however their website makes no mention of such advocacy for environmental or recreational issues outside of the workplace environment. Furthermore, the name of the group itself does not make any reference to environmental issues, but rather implies an interest in workplace safety concerns.

OPIC finds that the interests Texas Injured Workers seeks to protect are not germane to the organization's purpose, therefore OPIC recommends denying the hearing request of Texas Injured Workers.

⁴ See TWC § 11.134(b); 30 TAC §297.42.

⁵ TWC § 11.147(d).

⁶ TWC 11.134(b)(3)(C)

B. Issues Raised in the Hearing Request

The following issues have been raised in a joint hearing request submitted by Union of Commercial Oystermen of Texas, San Antonio Bay Water Keeper, and Texas Injured Workers:

- (1) Whether increased copper discharges allowed in the permit will adversely affect the water quality and threaten aquatic species.
- (2) Whether increased chloroform discharges will adversely affect water quality and threaten aquatic species.
- (3) Whether permit conditions giving Formosa three years to meet dioxin and furan discharge standards is an abuse of discretion and whether it would violate the Clean Water Act.
- (4) Whether Formosa's discharges will degrade segments 2453, 2454, Cox Lake, Cox Bay, and Lavaca/Chocolate Bay in violation of the Clean Water Act.
- (5) Whether the TCEQ inaccurately determined Formosa's compliance history.
- (6) Whether the permit needs more specific standards to prohibit LLDPE pellets and PVC dust from being discharged into waters of the United States.
- (7) Whether the TCEQ must formally consult the US Fish and Wildlife Service regarding the effect on endangered and threatened species of these discharges, and whether such consultation must include information about LLDC pellets and PVC dust in the discharges, as well as increased copper and chloroform limits.
- (8) Whether a toxicity reduction evaluation should be required.
- (9) Whether Formosa should be subject to NSPS Standards.
- (10) Whether effluent limits based on Best Professional Judgment must clearly document and evaluate whether stricter, including zero discharge limits, are proper.
- (11) Whether significant pH and temperature excursions should be reported within 24 hours and the resulting damage monitored.
- (12) Whether the permit must require that all samples and measurements taken for the purpose of monitoring the regulated discharge are representative of the monitored activity.
- (13) Whether proper test procedures are included in the permit.

C. Issues Raised in the Comment Period

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) and (d)(4), 55.211(c)(2)(A)*.

D. Disputed Issues

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

E. 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)*. All of the issues presented are issues of fact appropriate for referral to SOAH.

F. Relevant and Material Issues

The hearing requests raise 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). In order 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. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–51 (1986) (in discussing the standards applicable to reviewing motions for summary judgment the Court stated “[a]s to materiality, the substantive law will identify which facts are material . . . it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs”). Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Id.*

The TCEQ is responsible for the protection of water quality under Chapter 26 of the TWC and 30 TAC Chapters 305, 307 and 309. 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, propagation and protection of terrestrial and aquatic life...” *30 TAC § 307.1*. OPIC concludes that Issues nos. 1 through 13 related to the permit's compliance with the Clean Water Act, the protection of wildlife including aquatic life as well as endangered and threatened species, the proper calculation and use of Applicant's compliance history as laid out in

30 TAC ch. 60, and the adequacy and conclusions of the technical review process are issues that are relevant and material to the Commission's decision on this application.

G. Issues Recommended for Referral

OPIC recommends that the following disputed issues of fact be referred to SOAH for a contested case hearing:

- (1) Whether increased copper discharges allowed in the permit will adversely affect water quality and threaten aquatic species.
- (2) Whether increased chloroform discharges will adversely affect water quality and threaten aquatic species.
- (3) Whether permit conditions giving Formosa three years to meet dioxin and furan discharge standards is an abuse of discretion and whether it would violate the Clean Water Act.
- (4) Whether Formosa's discharges will degrade segments 2453, 2454, Cox Lake, Cox Bay, and Lavaca/Chocolate Bay in violation of the Clean Water Act.
- (5) Whether the TCEQ inaccurately determined Formosa's compliance history.
- (6) Whether the permit needs more specific standards to prohibit LLDPE pellets and PVC dust from being discharged into waters of the United States.
- (7) Whether the TCEQ must formally consult the US Fish and Wildlife Service regarding the effect on endangered and threatened species of these discharges, and whether such consultation must include information about LLDC pellets and PVC dust in the discharges, as well as increased copper and chloroform limits.
- (8) Whether a toxicity reduction evaluation should be required.
- (9) Whether Formosa should be subject to NSPS Standards.
- (10) Whether effluent limits based on Best Professional Judgment must clearly document and evaluate whether stricter, including zero discharge limits, are proper.
- (11) Whether significant pH and temperature excursions should be reported within 24 hours and the resulting damage monitored.
- (12) Whether the permit must require that all samples and measurements taken for the purpose of monitoring the regulated discharge are representative of the monitored activity.
- (13) Whether proper test procedures are included in the permit.

H. Maximum Expected Duration of 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 stating a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(d)(7), OPIC estimates that the maximum expected duration of a 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

OPIC recommends granting the hearing requests of Union of Commercial Oystermen of Texas and San Antonio Bay Water Keeper and denying the hearing request Texas Injured Workers. OPIC also recommends that the referral to the State Office of Administrative Hearings include the issues referenced in Section III.G above. OPIC further recommends a hearing duration of nine months.

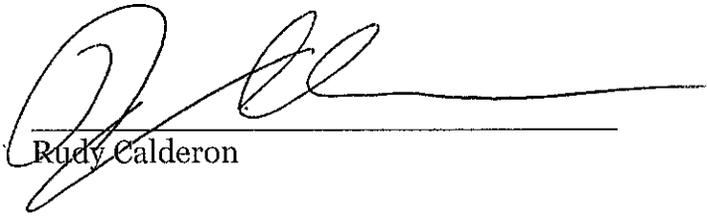
Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: 
Rudy Calderon
Assistant Public Interest Counsel
State Bar No. 24047209
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-3144 Phone
(512) 239-6377 Fax

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2015, 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, electronic mail, or by deposit in the U.S. Mail.



Rudy Calderon

MAILING LIST
FORMOSA UTILITY VENTURE, LTD. &
FORMOSA PLASTICS CORPORATION, TEXAS
TCEQ DOCKET NO. 2015-1528-IWD

FOR THE APPLICANT:

Matt Brogger
Environmental Manager
Formosa Plastics Corporation, Texas
P.O. Box 700
Point Comfort, Texas 77978-0700
Tel: 361/987-7468

Nancy Koch
Weston Solutions, Inc.
2705 Bee Caves Road, Suite 100
Austin, Texas 78746-5685
Tel: 512/329-3701 Fax: 512/327-6163

FOR THE EXECUTIVE DIRECTOR

Kathy Humphreys, Staff Attorney
TCEQ Environmental Law Division
MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600
Fax: 512/239-0606

Michael Sunderlin, Technical Staff
TCEQ Water Quality Division, MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4523
Fax: 512/239-4430

Brian Christian, Director
TCEQ Environmental Assistance
Division, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000
Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE
RESOLUTION

Kyle Lucas
TCEQ 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:

Bridget Bohac
TCEQ Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311

REQUESTERS:

Erin Gaines
Amy Johnson
Enrique Valdivia
Texas RioGrande Legal Aid
4920 North IH-35
Austin, Texas 78751-2716

Amy Johnson
Texas RioGrande Legal Aid
1111 North Main Avenue
San Antonio, Texas 78212-4713

Diane Wilson
Texas Injured Workers
161 Old Settlement Road
Seadrift, Texas 77983-4426