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January 11, 2016

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

**RE: TCEQ Docket No. 2015-1528-IWD;
Formosa Plastics Corporation, Texas and Formosa Utility Venture, Ltd.;**
Protestants' Reply to Responses to Hearing Request

Dear Ms. Bohac:

Protestants submit this reply to the responses filed by the Executive Director (ED), the Office of Public Interest Counsel (OPIC), and Formosa on December 28, 2015. This reply supplements Protestants' previous comments and clarifies matters relating to standing and issues to be referred to SOAH.

For the reasons stated below, Protestants respectfully request that the TCEQ Commissioners refer all of the issues from the comment period to SOAH for a contested case hearing, as they are all disputed issues of fact that are relevant and material and timely filed. The only exceptions are the issues that Formosa has now withdrawn from its application, which are noted below.

I. ALL ORGANIZATIONAL PROTESTANTS ARE AFFECTED PERSONS

The Union of Commercial Oystermen of Texas is composed of shrimpers and oystermen who fish and/or earn their livelihood in Lavaca/Chocolate Bay and other bays in the vicinity. The bays, shrimp and oysters are directly affected by the wastewater discharged by Formosa. Union members' ability to earn a living is affected by Formosa's wastewater discharge into Lavaca Bay in a manner not common to members of the general public. The Union's mission is to protect the waters of the Texas Gulf Coast and thereby promote a sustainable livelihood for its members and their families. The interests the Union seeks to protect in this case are germane to the Union's purpose. It has previously identified three member oystermen who the ED agrees have

standing in their own right – Mauricio Blanco, Francisco Hurtado and Jose Luis Cruz. Finally, the relief requested by the Union does not require participation by any individual member. Accordingly, the Union is an affected person and should be granted party status in the contested case on this matter.

The 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 for our children, our economy and our future, through advocacy, education, and enforcement of the Clean Water Act. Water Keeper members' use and enjoyment of the bays and watershed are affected by Formosa's wastewater discharges. Protestants identified two WaterKeeper members with standing in their own right, David and Christie Campos. David and Christie live in Port Lavaca and own a boat which they use to make their livelihood harvesting oysters and shrimp from Lavaca Bay and adjacent bays. The interests Water Keeper seeks to protect in this case are germane to its purpose. It has previously identified members who have standing in their own right. And the relief requested by Water Keeper does not require participation by any individual member. Accordingly, Water Keeper is an affected person and should be granted party status in the contested case on this matter.

II. ISSUES TO REFER TO SOAH

Protestants agree with OPIC that all thirteen of the issues referenced in its response should be referred to SOAH. Protestants also agree that the issues the ED recommends should be referred, which are numbered and phrased differently but cover many of the same thirteen issues, should be referred to SOAH. However, some of the issues the ED does not recommend referring should also be referred as they are timely filed disputed issues of fact that are relevant and material to TCEQ's decision on the application. 30 TAC § 50.115(c), 55.211(c).

a. Issues of Fact

An issue referred to SOAH must be either "a disputed question of fact or a mixed question of law and fact." 30 TAC § 50.115 (c)(1). The following issues (using the ED's numbering system) are disputed issues of fact or mixed issues of law and fact applied to law rather than pure disputed issues of law, as the ED asserts in its Response without any explanation. Because these issues are also relevant and material and timely filed during the comment period, the following issues should be referred to SOAH.

ED Issue 7 – *Whether the effluent limits in Formosa's permit should be both concentration based and mass based.* – This is a sub-issue within the larger factual issue of whether the effluent limit for copper in the draft permit is appropriate, and should be included as part of that issue.

ED Issue 8 – *Whether the synergistic effect of copper with mercury from Alcoa’s nearby mercury Superfund site, coupled with an increase in copper loadings trigger an unforeseen synergistic effect on the marine life and ecosystem in Lavaca Bay.* This is a factual issue as to whether Formosa’s copper discharges will have a detrimental impact on aquatic life in the Bay, and should also be included within the issue of whether the effluent limit for copper is appropriate. A review of this issue would require expert testimony to explain the characteristics of the existing superfund site and how that existing contamination, coupled with Formosa’s proposed discharge could impact Lavaca Bay; the need for such testimony shows the factual nature of the claims.

ED Issue 13 – *Whether the TCEQ accurately determined Formosa’s compliance history.* This is an issue of whether the law was correctly applied to the specific facts about Formosa’s compliance history in this case.

ED Issue 18 – *Whether the Executive Director appropriately applied the New Source Performance Standards in preparing the draft permit.* This is another example of whether a law was applied properly to the facts of this case, including Formosa’s specific history of expanding its facilities, and is thus not a purely legal issue.

ED Issue 23 – *Whether discharges under the terms of the draft permit would result in a taking of endangered species or would harm threatened species.* This is a factual determination of whether the terms of this specific permit would result in an illegal action. Expert testimony would be necessary to show the likely effects of the discharge on threatened and endangered species; the need for such testimony shows the factual nature of the claims.

ED Issue 28 – *Whether Formosa should be required to report violations of certain effluent limits within 24 hours.* This is a fact issue as to whether a permit term is adequate to protect the aquatic species and ecosystem.

b. Issues Raised during Comment Period

The ED erroneously recommended the Commissioners not refer the following issues (using the ED’s numbering system), even though they were raised by Protestants during the comment periods and thus should be referred to SOAH. 30 TAC §§ 55.201(c) and (d)(4), 55.211(c)(2)(A).

ED Issue 41 – *Whether the increased limits for copper or chloroform will threaten aquatic species.* Protestants have raised many concerns regarding anti-backsliding and the impacts of increased copper and chloroform in previous comments, particularly related to the impacts on wildlife and the aquatic ecosystem. This issue falls within comments previously filed. *See, e.g.,* Comments filed online by Diane Wilson with TCEQ, July 28, 2013 (“would an

increase in copper loadings trigger an unforeseen synergistic effect on the marine life and ecosystem in Lavaca Bay?"); Comments filed August 2, 2013 by TRLA on behalf of individuals and the Union of Oystermen (describing concerns about increased discharge of pollutants in segments 2453 and 2454 and the impacts to aquatic life and oysters as well as concerns about backsliding from increased copper and chloroform in Issues 2, 5 & 6).

ED Issue 42 – *Whether effluent limits based on Best Professional Judgment must clearly document and evaluate whether stricter, including zero discharge limits, are proper.* This issue, which was stated in Protestant’s latest comments filed online by TRLA, September 18, 2015 (Issue 10), was a clarification of a previous comment filed online by Diane Wilson with TCEQ on July 28, 2013, stating that “zero discharge should be an option.”

ED Issue 43 – *Whether the draft permit should require that all samples and measurements taken for the purpose of monitoring the regulated discharge are representative of the monitored activity.* This issue was raised by EPA on page 2 of its Interim Objection Letter to the Draft Permit, July 28, 2011, in comments filed August 2, 2013 by TRLA on behalf of individuals and the Union of Oystermen (“The OCPSF requires monitoring effluent before it is mixed, which is not a permit condition in the proposed draft permit.”), and in Protestants’ latest comments filed online by TRLA, September 18, 2015 (Issue 12).

c. Relevant and Material Issues

The ED erroneously recommended the Commissioners not refer the following issues (using the ED’s numbering system), even though they are relevant and material issues and thus should be referred to SOAH. 30 TAC §§ 55.201(d)(4), 55.211(c)(2)(A).

ED Issue 1 – *Whether the permit needs more specific standards to prohibit Formosa from discharging floating debris and suspended solids such as polyethylene pellets or PVC dust.* Effective and enforceable permit terms related to these harmful discharges are necessary and relevant because of the problematic compliance history of TCEQ with regard to discharges of these substances. This is relevant to TCEQ’s responsibility for protection of water quality in the state and to ensure that 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.

ED Issue 37 – *Whether TCEQ should have consulted with the United States Fish and Wildlife Service (USFWS) and the Texas Parks and Wildlife Department (TPW) before issuing the draft permit.* In its response, Formosa states that TCEQ consulted with USFWS and TPWD about this permit, but Protestants have not seen evidence of this and did not receive this information in the FOIA request submitted to USFWS included as Attachment A to comments filed on September 18, 2015. This is a disputed issue of fact that is relevant to the protection of

terrestrial and aquatic life, particularly endangered species, and should thus be referred to SOAH. It is relevant as to whether Formosa's draft permit complies with the law to protect endangered species.

d. Issues Withdrawn by Formosa

Protestants agree with the ED that the following issues should not be referred to SOAH because they have already been removed from the draft permit as requested by Formosa: **ED Issues 9, 15, 19.**

Sincerely,



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cc: Mailing List