

Bryan W. Shaw, Ph.D., P.E., *Chairman*
Toby Baker, *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

June 13, 2016

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: **CLEAN HARBORS SAN LEON, INC.**
TCEQ DOCKET NO. 2016-0666-IWD

Dear Ms. Bohac:

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

Sincerely,

A handwritten signature in cursive script that reads "Pranjali".

Pranjali M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-0666-IWD

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION OF CLEAN	§	
HARBORS SAN LEON, INC. FOR A	§	TEXAS COMMISSION ON
MAJOR AMENDMENT OF TPDES	§	
PERMIT NO. WQ004086000	§	ENVIRONMENTAL QUALITY

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

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 (TCEQ or "Commission") files this Response to Requests for Hearing and Requests for Reconsideration in the above-referenced matter and respectfully submits the following.

I. INTRODUCTION

A. Background of Facility

Clean Harbors San Leon, Inc. (Applicant) has applied to the TCEQ for a major amendment of its existing permit to authorize the discharge of treated process wastewater and treated contaminated stormwater at a daily average flow not to exceed 105,000 gallons per day via proposed internal Outfall 101. The Applicant currently operates the Clean Harbors Recycling Facility, a recycling and storage facility that handles oily waste from the petroleum refining and petrochemical industries. The draft permit would authorize the discharge of stormwater associated with industrial activity and previously monitored effluent such as treated process wastewater and treated contaminated stormwater from internal Outfall 101, on an intermittent and flow-variable basis via Outfall 001. The draft permit also establishes final effluent

limitations including Daily Average and Daily Maximum for each pollutants for Outfall 001 and 101.

The draft permit would authorize the treated effluent to be discharged to a drainage ditch; thence to an unnamed tidal tributary of Dickinson Bayou Tidal; thence to Dickinson Bayou Tidal in Segment No. 1103 of the San Jacinto-Brazos Coastal Basin. The unclassified receiving waters have minimal aquatic life use for the unnamed ditch and high aquatic life use for the unnamed tidal tributary. The designated uses for Segment No. 1103 are high aquatic life use and primary contact recreation. The facility is located at 2700 Avenue S, San Leon, Texas 77539.

B. Procedural Background

TCEQ received Applicant's application on May 4, 2015. On June 24, 2015, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain an Air Quality Permit (NORI) was published in English on July 16, 2015, in the *Galveston County Daily News* and in Spanish on July 24, 2015 in the *El Observador News*. The ED completed the technical review of the application and prepared a draft permit. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published in English on September 20, 2015, in the *Galveston County Daily News* and in Spanish on September 18, 2015 in the *El Observador News*. The comment period for this application closed on October 20, 2015. A public meeting regarding this permit application was held on January 25, 2016 at the Johnson Community Center. The ED filed the Response to Comments on March 29, 2016 and Amended Response to Comments on March 30, 2016. The Chief Clerk's office mailed the Executive Director's Decision April 1, 2016. The deadline to request a contested case hearing was May 2, 2016.

The Commission received timely requests for a contested case hearing from MaryLou Bishop & Family, Phil Cone on behalf of Save Our Shores, Kelley Dawson, Peter S. Donzello,

Emily Forswall, Hajrulla Halili on behalf of the Razz Halili Trust, Valarie Hawley, Joe Manchaca, John T. & Mary Ann McCracken, Aubrey Page, Mr. Terry S. Singeltary Sr., Fran Steele and Barbara Thomson. The Commission also received requests for reconsideration from Valarie Hawley, John T. & Mary Ann McCracken and Mr. Terry S. Singeltary Sr. For the reasons stated herein, OPIC recommends the Commission grant the hearing requests from MaryLou Bishop & Family and Harjulla Halili on behalf of the Razz Halili Trust. OPIC further recommends denial of the requests for reconsideration filed by Valarie Hawley, John T & Mary Ann McCracken and Mr. Terry S. Singeltary Sr.

II. APPLICABLE LAW

This application was declared administratively complete on June 24, 2015. 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 TEX. ADMIN. CODE (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, including local governments and public agencies, with authority under state law over issues raised by the application may be considered affected persons. 30 TAC § 55.203(b). 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).

Further, 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. 30 TAC § 55.205(b).

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. Requests for Reconsideration

The hearing requests filed by John T. & Mary Ann McCracken and Terry S. Singeltary Sr. also requested reconsideration of the ED's decision on the Applicant's application. A separate request for reconsideration was filed by Valarie Hawley. Under 30 TAC § 50.139, any person may file a request for reconsideration. The request must include the reasons why the ED's determination should be reconsidered by the Commission. The requests for reconsideration have stated issues and concerns about water quality, effects on the human health and the environment and air pollution. The concerns about air pollution cannot be addressed by this water quality permit. The other issues and concerns raised in the requests are within the Commission's jurisdiction to consider in proceedings on this application. As discussed further below, OPIC recommends that these issues be referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing. However, at this point in the process prior to further development of

the record through a contested case hearing, OPIC cannot conclude whether the application should be granted or denied in light of the concerns raised in the request for reconsideration. Therefore, OPIC must recommend denial of the requests for reconsideration. OPIC further discusses the hearing requests below.

B. Determination of affected person status

The Commission received thirteen hearing requests related to the proposed permit. OPIC preliminarily reviewed each of these requests to determine whether the requestor resided in sufficient proximity to the proposed outfall to support a finding of affectedness. None of the thirteen requestors are included in the Adjacent Landowners Map attached in the Appendix 1.

The hearing request filed by Phil Cone on behalf of Save Our Shores raises concerns about the water supply, water quality and air pollution. The interests the group seeks to protect must be germane to the organization's purpose. 30 TAC § 55.205(a)(2). Save Our Shores states that its primary function is to educate the general public regarding threats to the delicate ecology of Galveston Bay and the entire Texas Gulf Coast and to advocate for preservation. The proposed outfall 101 and the discharge route are within the Galveston Bay area. OPIC finds that the interests raised by Save Our Shores are germane to the group's purpose and Save Our Shores has satisfied this requirement for group standing. To gain standing as a group, however, Save Our Shores must also present at least one member who would individually qualify as an affected person. 30 TAC § 55.205(a)(1). Save Our Shores did not name a member who owns property in close proximity to the receiving stream or the discharge point sufficient for OPIC to find that a member qualifies as an affected person. In the absence of showing any member who would individually qualify as an affected person, Save Our Shores did not satisfy §55.205(a)(2) and OPIC cannot recommend granting the group's request at this time. However, 30 TAC §55.205(b)

authorizes OPIC to request an explanation of how a group or association meets the requirements of subsection §55.205(a). By the reply deadline of June 27, 2015, if Save Our Shores provides such information about any of its member who would individually qualify as an affected person, OPIC may reconsider its position.

The hearing request submitted by Joe Manchaca on behalf of San Leon Municipal Utility District (MUD) states only that the San Leon MUD is requesting a contested case hearing. The District, as a governmental entity, can be considered an affected person if the District has statutory authority over issues relevant to the application. 30 TAC §55.205(c)(6). The MUD's hearing request does not state specific interests nor cite to statutory authority relevant to the application. In the absence of any such details, OPIC cannot determine if San Leon MUD would qualify as an affected person.

The hearing request submitted by Terry S. Singeltary, Sr. raises concerns about water quality, the alleged impact on Dickinson Bayou and various industries that grow at the mouth of the Bayou. The GIS map prepared by ED and the Adjacent Landowners Map included in the application do not identify Mr. Singeltary's location within close proximity to the Applicant's facility. From other research methods, OPIC could not locate Mr. Singeltary's property within close proximity to the facility. Therefore, OPIC finds that Mr. Singeltary does not qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c).

The hearing request submitted by Barbara Thompson raises concerns about the alleged adverse effect on human health and marine life from possible contaminants discharged to Dickinson Bayou. The hearing request also raises concerns about the compliance history of the Applicant and several violations within the last few years. The GIS map prepared by ED and the Adjacent Landowners Map included in the application do not identify Ms. Thompson's location

within close proximity to the Applicant's facility. From other research methods, OPIC could not locate Ms. Thompson's property within close proximity to the facility. Therefore, OPIC finds that Ms. Thompson does not qualify as an affected person based on the factors set forth in 30 TAC § 55.203(c).

The GIS map prepared by the ED shows the location of nine hearing requestors: Valarie Hawley; Emily Forswall; Aubrey Page; Kelley Dawson; MaryLou Bishop; John and Mary Ann McCracken; Fran Steele; Peter Donzello and the Razz Halili Trust. OPIC recommends that Valarie Hawley, Emily Forswall, Aubrey Page, Kelley Dawson, John and Mary Ann McCracken, Fran Steele and Peter Donzello are not affected persons because the distance between the requestors' properties and the proposed outfall renders potential impacts to their health, safety, or use of property unlikely.

Two requestors identify property interests that are closer to the proposed regulated activity. Specifically, those requestors are: MaryLou Bishop and The Razz Halili Trust. In further analysis below, OPIC discusses whether these requestors otherwise satisfy requirements for showing a personal justiciable interest.

The hearing request filed by Harjulla Halili on behalf of the Razz Halili Trust states that the trustee has "concerns about the discharge that this permit will allow." While the hearing request does not further specify those concerns or state specifically how the requestor may be adversely affected, given that the ED's map shows property owned by the trust along Dickinson Bayou in close proximity to Applicant's outfall, OPIC recommends the Commission find the Razz Halili Trust qualifies as an affected person based on the factors set forth in 30 TAC § 55.203(c).

The hearing request submitted by MaryLou Bishop and Family raises concerns about water quality, alleged adverse health effects and adverse impacts on businesses that depend on the water. These concerns are protected by the law under which the application will be considered. Also, a reasonable relationship exists between the water quality concerns and the TCEQ's regulation of the proposed facility. The ED's map shows this requestor owning property on Dickinson Bayou approximately one mile from Applicant's outfall into the bayou. Because of her proximity to the proposed facility, Ms. Bishop could be affected by the operations from the proposed facility in a manner not common to members of the general public. Therefore, OPIC finds that Ms. Bishop and Family qualify as an affected person entitled to a contested case hearing based on the factors set forth in 30 TAC § 55.203(c).

B. Issues Raised by the hearing requests of MaryLou Bishop and Harjulla Halili

1. Whether the proposed discharge would have a negative environmental impact by adversely affecting water quality and harming the ecosystem of the receiving waters including Dickinson Bayou?
2. Whether the proposed discharge would adversely affect human health?

C. Which issues raised in the hearing request are disputed

All of the issues raised in the hearing request are disputed.

D. Whether the dispute involves questions of fact or of law

The disputed issues involve questions of fact.

E. Whether the issues were raised during the public comment period

All of the issues were raised during the public comment period.

F. Whether the hearing request is based on issues raised solely in a public comment which has been withdrawn

The hearing request is not based on issues raised solely in a public comment which has been withdrawn.

F. Whether the issues raised are relevant and material to the decision on the application

In order to refer an issue to the State Office of Administrative Hearings (“SOAH”), the Commission must find that the issue is relevant and material to the Commission’s decision to issue or deny this permit. *See* 30 TAC §§ 55.201(d)(4), 55.209(e)(6) and 55.211(c)(2)(A).

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, 248-251 (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.”)

Pursuant to Texas Water Code §§ 26.027(a) and 26.003, the Commission may issue permits for wastewater discharges based upon the draft permit’s effectiveness in maintaining the water quality of the state. Chapter 307 of the Commission’s rules (Texas Surface Water Quality Standards) provides that the surface waters of Texas cannot be made toxic to aquatic or terrestrial organisms or cause endangerment to human health. One of the charges of 30 TAC § 307.1 is to “maintain the quality of water in the state consistent with public health and enjoyment.” Issue No. 1 concerning protection of water quality and the ecosystem of the receiving waters and issue No. 2 concerning protection of human health are addressed by the substantive law that governs this application. Therefore, these issues are relevant and material.

H. Issues for Referral

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

1. Whether the proposed discharge would have a negative environmental impact by adversely affecting water quality and harming the ecosystem of the receiving waters including Dickinson Bayou?
2. Whether the proposed discharge would adversely affect human health?

IV. MAXIMUM EXPECTED DURATION OF HEARING

Commission rule 30 TAC § 55.115(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 six months from the first date of the preliminary hearing until the proposal for decision is issued.

V. CONCLUSION

For the reasons stated above, OPIC recommends granting the hearing requests of MaryLou Bishop and Family and Harjulla Halili on behalf of the Razz Halili Trust and referring this application to SOAH for a contested case hearing of no longer than six months on the issues listed in Section III H above.

Respectfully submitted,

Vic McWherter
Public Interest Counsel

By: Pranjal
Pranjal M. Mehta
Assistant Public Interest Counsel, TCEQ
P.O. Box 13087 MC 103
Austin, Texas 78711
(512)239-0574 PHONE
(512)239-6377 FAX
Texas Bar #24080488

Eli Martinez
Assistant Public Interest Counsel, TCEQ
P.O. Box 13087 MC 103
Austin, Texas 78711
(512)239-3974 PHONE
(512)239-6377 FAX
Texas Bar #24056591

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2016 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing and Requests for Reconsideration 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.

Pranjal
Pranjal M. Mehta

MAILING LIST
CLEAN HARBORS SAN LEON, INC.
TCEQ DOCKET NO. 2016-0666-IWD

FOR THE APPLICANT:

Tia Gottas-Hamman
Clean Harbors San Leon, Inc.
2700 Avenue S
San Leon, Texas 77539-7285
Tel: 281/339-1352 Fax: 281/339-1351

Michael Crisenbery
Clean Harbors San Leon, Inc.
4879 Spring Grove Avenue
Cincinnati, Ohio 45232-1938
Tel: 512/823-2280

FOR THE EXECUTIVE DIRECTOR:

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

Shannon Gibson, Technical Staff
TCEQ Water Quality Division,
MC- 148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4284 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:

Marylou Bishop
6001 Avenue W
Dickinson, Texas 77539

Phil Cone
PO Box 1020
Bacliff, Texas 77518

Kelley Dawson
1404 Leeward Cir.
Kemah, Texas 77565-2998

Peter S. Donzello
1315 Edwards Dr.
San Leon, Texas 77539-9647

Emily Forswall
2515 Addison Rd.
Houston, Texas 77030-1811

Hajrulla Halili
PO Box 8448
Bacliff, Texas 77518-8448

Valarie Hawley
PO Box 8858
Bacliff, Texas 77518-8858

Joe Manchaca
San Leon Mud
PO Box 594
Kemah, Texas 77565-0594

John T. & Mary Ann Mccracken
609 Avenue A
San Leon, Texas 77539

Aubrey Page
2451 Pamplona Ln.
League City, Texas 77573-1585

Terry S. Singeltary., Sr.
PO Box 42
Bacliff, Texas 77518-0042

Fran Steele
1215 23rd St.
San Leon, Texas 77539-8603

Barbara Thompson
PO Box 9214
Bacliff, Texas 77518-9214