

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

October 24, 2016

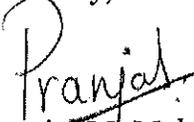
Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: **HONEY HOLDING I, LTD.**
TCEQ DOCKET NO. 2016-1284-IWD

Dear Ms. Bohac:

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

Sincerely,


Pranjal M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2016-1284-IWD

**IN THE MATTER
OF THE APPLICATION OF
HONEY HOLDING I, LTD. FOR
TPDES PERMIT
NO. WQ0005155000**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO A REQUEST 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 a Request for Hearing in the above-referenced matter and respectfully submits the following.

I. INTRODUCTION

A. Background of Facility

Honey Holdings I, Ltd. (Applicant) owns a facility that packs and distributes honey and has applied to the TCEQ for proposed TPDES permit no. WQ0005155000 to authorize the discharge of treated wastewater at a volume not to exceed a daily average flow of 5,000 gallons per day via outfall 001. The facility is located on the north frontage road at 11711 Interstate 10 East, approximately 2 miles east of the intersection of Interstate 10 and State Highway 146 South, in Baytown, Chambers County, Texas 77523. The Applicant intends to discharge treated wash water from the washing of drums and totes that contain residual honey. Washing of the totes and drums will be conducted indoors. The wash water enters the drain which is connected to an underground storage tank. Wash water will then be pumped into the treatment system via a pipeline. The treated wash water will be conveyed through a pipe to the proposed discharge point 001. The effluent is discharged to a roadside ditch, thence to Cedar Bayou Tidal in Segment No.

0901 of the Trinity-San Jacinto Coastal Basin. The unclassified receiving waters have minimal aquatic life use for the roadside ditch. The designated uses for Segment No. 0901 are high aquatic life use and primary contact recreation. Segment 0901 is currently listed on the State's inventory of impaired and threatened waters, the 2012 Clean Water Act Section 303(d) list.

B. Procedural Background

TCEQ received Applicant's application on January 25, 2015. On April 25, 2015, the Executive Director (ED) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in English on June 4, 2015 in Chambers County in the *Baytown Sun*. On June 3, 2015, the ED completed the technical review of the application. The Notice of Application and Preliminary Decision for a Water Quality Permit (NAPD) was published on October 27, 2015 in the *Baytown Sun*, in Chambers County, Texas. The public comment period for this application ended on November 30, 2015. The Chief Clerk's office mailed the ED's Decision and Response to Comments on June 20, 2016. The deadline to request a contested case hearing was July 22, 2016.

TCEQ received a timely request for a contested case hearing from Ernie F. & Patsy W. Battle (Requestors) on August 24, 2015. OPIC recommends granting the hearing request from Requestors.

II. APPLICABLE LAW

This application was declared administratively complete on August 25, 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 with authority under state law over issues contemplated 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).

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. Whether the Requestors are affected persons

According to the hearing request, the proposed discharge route flows directly in front of the Requestors' property. The Requestors state that because their property is adjacent to the Applicant's facility the wastewater flow would be heaviest in front of their land. The Requestors are concerned about continual water discharge and resulting adverse effects including mosquito infestation, overgrown weeds and bad odors.

The adjacent landowners list provided by the Applicant and the map provided by the ED staff confirm the location of the Requestors' property adjacent to the proposed facility and the path of the discharge route across the front of their property. Given the Requestors' proximity to the discharge route and their concerns regarding bad odors and other adverse conditions, they

have demonstrated a personal justiciable interest which is not common to the general public and have shown that they are affected persons. *See* 30 TAC § 55.203(a).

The factors listed in § 55.203(c) support the conclusion that the Requestors are affected persons. First, the Requestors' claimed interests are protected by the law under which this application will be considered. *See* 30 TAC § 55.203(c)(1). Because the discharge route runs across the boundary of through their property, there is a reasonable relationship between the interests claimed and the regulation of the proposed industrial wastewater discharge. *See* 30 TAC § 55.203(c)(3). Finally, the proposed discharge has the potential to adversely impact the Requestors' use of their property.

For all these reasons, OPIC finds that the Requestors are affected persons under 30 TAC § 55.203.

B. Issues Raised in the hearing request

1. Whether the proposed permit would create or maintain nuisance conditions that would interfere with the Requestors' use and enjoyment of their property?

C. Which issues raised in the hearing request are disputed

The issue raised in the hearing request is disputed.

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

The disputed issue involves questions of fact.

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

The issue was 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.”)

The Texas Surface Water Quality Standards under 30 TAC §307.4(b)(1) provides that concentrations of taste and odor producing substances must not result in offensive odors arising from the waters or otherwise interfere with the reasonable use of the water in the state. Therefore, the bad odor concerns raised by the Requestors are addressed by the substantive law that governs this application and therefore is relevant and material to the Commission’s decision. However, the TCEQ is not authorized to consider mosquito infestation and overgrown weeds as long as the water quality is maintained. Therefore, the concerns about the mosquito infestation and overgrown weeds are not relevant and material.

H. Issues for Referral

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

1. Whether the proposed permit would create or maintain nuisance conditions that would interfere with the Requestors' use and enjoyment of their property?

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 request of Ernie F. and Patsy W. Battle and referring this application to SOAH for a contested case hearing of no longer than six months on the issue listed in Section III H above.

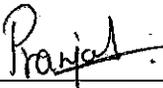
Respectfully submitted,

Vic McWherter
Public Interest Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2016 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to a Request for Hearing was 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 M. Mehta

**MAILING LIST
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TCEQ DOCKET NO. 2016-1284-IWD**

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