

DOCKET 2022-0157-AIR

MAX MIDSTREAM TEXAS LLC § BEFORE THE
SEAHAWK CRUDE CONDESATE § TEXAS COMMISSION ON
TERMINAL, AIR PERMIT 162941 § ENVIRONMENTAL QUALITY

OFFICE OF PUBLIC INTEREST COUNSEL'S
RESPONSE TO HEARING REQUESTS

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this response to the hearing requests in the above-captioned matter.

I. Summary of Position

For the reasons stated herein, OPIC respectfully recommends the Commission grant the hearing request from the San Antonio Bay Estuarine Waterkeeper organization, refer the relevant and material issues specified in Section IV.B to the State Office of Administrative Hearings (SOAH) for a contested case hearing, and deny the remaining hearing requests.

II. Background

On October 6, 2020, Max Midstream Texas LLC (Applicant) applied to TCEQ for new Air Permit 162941. The application was declared administratively complete October 8, 2020. Applicant is proposing to modify and expand a crude condensate terminal at Point Comfort in Calhoun County. Applicant would be authorized to emit carbon monoxide, hazardous air pollutants, hydrogen sulfide, nitrogen oxides, volatile organic compounds, sulfur dioxide, and particulate matter including particulate matter with diameters of 10 microns or less (PM₁₀) and 2.5 microns or less (PM_{2.5}).

The first newspaper notice was published in Spanish on October 27, 2020 in *La Prensa Comunidad*, and in English on October 28, 2020 in the *Port Lavaca Wave*. Using the same newspapers, the second notice was published May 4, 2021 in Spanish, and May 5, 2021 in English. The TCEQ held a virtual public meeting August 17, 2021, and the public comment period closed at the end of the meeting. The Executive Director's (ED) Response to Comments (RTC) was mailed December 10, 2021, and the deadline to submit a contested case hearing request was January 10, 2022. The TCEQ received over 2,500 hearing

requests. This response does not name each requestor, but the attached mailing list does include all known requestors.

III. Applicable Law

This application was filed on or after September 1, 2015, and is therefore subject to Senate Bill 709, Tex. S.B. 709, 84th Leg., R.S. (2015) (SB 709). For SB 709 applications, Texas Water Code Section 5.115(a-1)(2)(B) provides the Commission may not find that a hearing requestor is an affected person unless the hearing requestor timely submitted comments on the application. Texas Government Code Section 2003.047(e-1) further provides that each issue referred by the Commission must have been raised by an affected person in a timely comment filed by that affected person. The Commission's Chapter 55 rules implement these statutory requirements and other provisions of SB 709.

Under Title 30, Texas Administrative Code (TAC) § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that a hearing request must substantially comply with the following:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;
- (2) identify the person's personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity in a manner not common to members of the general public;
- (3) request a contested case hearing;
- (4) for applications filed on or after September 1, 2015, list all relevant and material disputed issues of fact that were raised by the requestor during the public comment period and that are the basis of the hearing request. To facilitate the Commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the ED's responses to the requestor's comments that the requestor disputes, the factual basis of the dispute, and list any disputed issues of law; and

- (5) provide any other information specified in the public notice of application.

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. An interest common to members of the general public does not qualify as a personal justiciable interest. Section 55.203(c) provides relevant factors to be considered in determining whether a person is affected. These factors 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;
- (6) for a hearing request on an application filed on or after September 1, 2015, whether the requestor timely submitted comments on the application that were not withdrawn; and
- (7) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

Under § 55.203(d), to determine whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the administrative record, including whether the application meets the requirements for permit issuance;
- (2) the analysis and opinions of the ED; and
- (3) any other expert reports, affidavits, opinions, or data submitted by the ED, the applicant, or hearing requestor.

For applications filed on or after September 1, 2015, § 55.205(b) states that a hearing request by a group or association may not be granted unless all of the following requirements are met:

- (1) comments on the application are timely submitted by the group or association;
- (2) the request identifies, by name and physical address, one or more members of the group or association that would otherwise have standing to request a hearing in their own right;
- (3) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (4) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

For an application filed on or after September 1, 2015, § 55.211(c)(2)(A)(ii) provides that a hearing request made by an affected person shall be granted if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application.

Under § 55.211(c)(2)(B)-(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

IV. Analysis of Hearing Requests

A. Whether the requestors are affected persons

San Antonio Bay Estuarine Waterkeeper

On November 12, 2020, combined comments and a hearing request were submitted by attorney Gabriel Clark-Leach on behalf of San Antonio Bay Estuarine Waterkeeper (Waterkeeper). On June 4, 2021, Waterkeeper provided additional comments and supplemental information to its hearing request, and on August 17, 2021 and January 10, 2022, Waterkeeper again supplemented its hearing requests to provide further information and identify more members who could be considered affected per 30 TAC § 55.203. The hearing requests state that Waterkeeper is a volunteer-run, non-profit membership organization whose mission encompasses protecting Lavaca Bay, where the Terminal is located, as well as publicizing areas of concern, filing comments and hearing

requests, and notifying government agencies about problems with water and air.

The hearing requests raise concerns regarding air pollution, recreational activities, human health, damage to ecosystems, adverse effects on wildlife and marine life, and negative impact on the fishing industry. The requests name several members, including Dale Jurasek, Mauricio Blanco, Diane Wilson, Curtis Miller, and John and Janet Maresh as group members and state that these members live, recreate, and depend on the fishing industry in the area surrounding the Terminal, and therefore, would be adversely affected by the proposed permit.

OPIC analyzed each member named on behalf of Waterkeeper and finds that John and Janet Maresh would qualify for standing in their own right. The request indicates that siblings John and Janet Maresh reside in Port Comfort, approximately 1.79 miles north of the Seahawk Terminal. The Mareshs raise concerns about air pollution resulting from Terminal expansion, as well as concerns about impacts to wildlife, the environment, their health, recreational activities, and use and enjoyment of their property. Based on their concerns and the proximity of their home to the Seahawk Terminal, OPIC finds that John and Janet Maresh have a personal justiciable interest in this matter which is not common to the members of the general public, and thus would qualify as affected persons.

Waterkeeper meets the requirements set forth in 30 TAC § 55.205(b) for associational standing. The hearing requests were based on the group's timely comments that were included in the requests on November 12, 2020, June 4, 2021, and August 17, 2021; the interests Waterkeeper seeks to protect are germane to its purpose; and none of the concerns raised require the participation of individual members. Finally, members John and Janet Maresh would qualify as affected persons, satisfying 30 TAC § 55.205(b)(2). Therefore, OPIC finds that Waterkeeper meets the requirements for group standing and qualifies as an affected person.

Texas Campaign for the Environment

On August 17, 2021, a timely hearing request and combined comments was submitted by attorney Gabriel Clark-Leach on behalf of Texas Campaign for the Environment (TCE). TCE also submitted prior timely comments on June 4, 2021 through its Executive Director, Robin Schneider. In addition, TCE supplemented its hearing request with additional information through Gabriel Clark-Leach on January 10, 2022. The combined information in the hearing requests submitted on August 17, 2021 and January 10, 2022 satisfies the requirements of 30 TAC § 55.201(d), and the issues timely raised during the comment period are derived from the August 17, 2021 hearing request and

comments submitted by Gabriel Clark-Leach, as well as the June 4, 2021 comments submitted by Robin Schneider.

TCE states that it is a nonprofit membership organization dedicated to informing and mobilizing Texans to protect their health, their communities, and the environment. The hearing requests raise concerns regarding the accuracy and completeness of the application; specifically, whether the Draft Permit constitutes a “sham permit,” and whether Applicant’s impacts demonstration improperly excluded secondary emissions from sources and proposed sources that are interconnected with the Terminal. In addition, the requests express concerns about air pollution and its impact on human and environmental health, impact on wildlife, and adverse effects on commercial and recreational fishing.

The January 10, 2022 hearing request names Curtis Miller and Mauricio Blanco as group members who could have standing in their own right per 30 TAC § 55.205(b)(2). The request specifies that Curtis Miller owns and operates Miller Seafood Company located at 1102 Broadway Street in Port Lavaca, approximately 4.8 miles from the Seahawk Terminal. The request indicates that Mr. Miller spends approximately 50-60 hours per week working at Miller Seafood Company. In addition, per the request, Mr. Miller spends time closer to the terminal approximately twice per month during his recreational fishing trips in Matagorda Bay and Lavaca Bay. Mr. Miller is specifically concerned about negative impacts to his health due to an increase in air emissions from Seahawk Terminal. Further, the request states that Miller Seafood Company relies on selling oysters harvested from the Bays immediately adjacent to the Seahawk facility, and Mr. Miller is concerned about particulate matter from the Terminal settling in the surrounding Bays and negatively impacting the nutrient balance in coastal waters, thus the impacting oysters relied upon by Miller Seafood Company. While concerns about air pollution and health effects could constitute a personal justiciable interest, the intervening distance between Miller Seafood Company, where Mr. Miller spends most of his time, and the Terminal diminishes the likelihood that Mr. Miller will be impacted in a way not common to members of the general public. In addition, OPIC finds that Mr. Miller’s monthly recreational fishing trips to areas surrounding the Terminal are not sufficient to establish a personal justiciable interest and distinguish Mr. Miller’s concerns from those of the general public. Therefore, OPIC finds that Curtis Miller would not qualify as an affected person, and thus cannot be used to meet the group standing requirements for TCE.

In addition, the January 10, 2022 request states that Mauricio Blanco is a commercial fisherman who has made a living shrimping and oystering in Matagorda and Lavaca Bays for the past 30 years, and Mr. Blanco’s livelihood is dependent on the maintenance of habitable Bays for shrimp, fish, and oysters. The request does not provide an address for Mr. Blanco but indicates that he

lives approximately five miles from the Terminal. Like Mr. Miller, the concerns raised by Mr. Blanco regarding impacts to marine life rest on concerns regarding air emissions settling in coastal waters, and the potential for negative impacts on the habitability of the Bays. Given the intervening distance between Mr. Blanco's stated location and the Terminal, and the fact that Mr. Blanco's concerns about water quality are not relevant and material to the Commission's decision on this air permit, OPIC finds that Mauricio Blanco would not qualify as an affected person, and thus cannot be used to meet the group standing requirements for TCE.

Based on the foregoing information, OPIC concludes that TCE does not meet the four requirements set forth in 30 TAC § 55.205(b) for associational standing. As discussed above, group members Curtis Miller and Mauricio Blanco would not qualify as affected persons in this matter, and therefore cannot be used to satisfy 30 TAC § 55.205(b)(2). Accordingly, OPIC finds that Texas Campaign for the Environment fails to qualify as an affected person.

Environmental Integrity Project and Texas Rio Grande Legal Aid

Both Environmental Integrity Project and Texas Rio Grande Legal Aid are named as requestors in the hearing requests submitted by attorney Gabriel Clark-Leach on November 12, 2020, August 17, 2021, and January 10, 2022. Despite being named as requestors, no information was provided to satisfy 30 TAC § 55.205(b), and thus, OPIC is unable to find that either group meets the requirements to qualify as an affected person in this matter.

Diane Wilson

Diane Wilson's timely hearing request and combined comments were submitted via the joint hearing request letter filed by attorney Gabriel Clark-Leach on November 12, 2020. Diane Wilson also provided comments on August 12, 2021. Gabriel Clark-Leach provided additional comments on Diane Wilson's behalf on June 4, 2021 and supplemented her hearing request on August 17, 2021. Ms. Wilson lists her address as 600 Ramona Road, Seadrift, TX 77983. The ED's map shows that Ms. Wilson's address is approximately 15 miles from the Terminal.

Ms. Wilson's requests raise concerns regarding the potential impact on Ms. Wilson's ability to recreate in the area surrounding the Terminal, air pollution, impacts to the fishing industry, impacts to the environment, and adverse effects on human health. Specifically, Ms. Wilson indicates that she is a member of Waterkeeper, and as part of her work for the organization, she visits waters within five miles of the Terminal to observe whether plastic pellets, powder, or flakes have been discharged from the Formosa Plastics facility in Point Comfort. The request indicates that Ms. Wilson has visited sites within

3100 feet of the Terminal three times within the past four months, and another site located 1300 feet from the Terminal twice last year. In addition, Ms. Wilson more regularly visits other Formosa outfalls located about 3 miles from the Terminal about once per week.

Given that Ms. Wilson resides 15 miles from the terminal and is most frequently present at locations roughly 3 miles from the Terminal, OPIC finds that she lacks the proximity needed to establish a personal justiciable interest, and the intervening distance diminishes the likelihood that she will be impacted in a way not common to members of the general public. Therefore, OPIC finds that Diane Wilson does not qualify as an affected person.

On-Map Form Letter Requestors (Kelcee Hufford, Bob Lindsey, Marcus Perez, Elizabeth Riebschlaeger)

According to the map prepared by ED staff, Kelcee Hufford, Bob Lindsey, Marcus Perez, and Elizabeth Riebschlaeger reside over 15 miles from the site. These requestors all timely submitted comments and hearing requests by using similar form letters. They are concerned about air quality, health effects, pollution control technology, and monitoring. However, these requestors lack the proximity needed to establish a personal justiciable interest which is distinct from interests common to the general public. Without a personal justiciable interest, a hearing requestor cannot qualify as an affected person. Further, the intervening distance diminishes any likelihood that the regulated activity will impact their health, safety, or use of property. Therefore, OPIC finds that Kelcee Hufford, Bob Lindsey, Marcus Perez, and Elizabeth Riebschlaeger do not qualify as affected persons.

Off-Map Requestors

The ED's map shows an area around the site which is approximately 50 miles from west to east and 40 miles from north to south. As previously stated, the TCEQ received over 2,500 hearing requests, but most of these requestors reside too far from the site to appear on the ED's map. These off-map requestors are not individually named here, but they are included on the mailing list filed for this matter. All of the requestors not shown on the ED's map lack the proximity needed to establish a personal justiciable interest which is distinct from interests common to the general public. Without a personal justiciable interest, a hearing requestor cannot qualify as an affected person. Further, the intervening distance diminishes any likelihood that the regulated activity will impact their health, safety, or use of property. OPIC must find that based on lack of proximity, any off-map requestor cannot qualify as an affected person.

B. Which issues raised in the hearing request are disputed

Waterkeeper raised the following disputed issues.

- Whether the draft permit is accurate and complete.
- Whether the draft permit is adequately protective of human health and safety.
- Whether the draft permit is adequately protective of wildlife, marine life, and the environment.
- Whether the draft permit will adequately protect against air pollution.
- Whether the application and draft permit include emission limits which reflect Best Available Control Technology (BACT).

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

All of the issues involve questions of fact.

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

The issues listed above in Section IV.B were all raised during the public comment period.

E. Whether the hearing request is based on issues raised solely in public comments which have been withdrawn

The hearing request is not based on issues raised solely in public comments which have been withdrawn.

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

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 the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986). All of the issues listed above in Section IV.B are relevant and material to the Commission's decision under the Texas Clean Air Act (Texas Health and Safety Code, Chapter 382) and TCEQ Rules (Texas Administrative Code, Title 30, Part 1), including Chapters 101, 111, 112, 113, 115, 116, and 117.

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, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 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 should be 180 days from the first day of the preliminary hearing until the proposal for decision is issued.

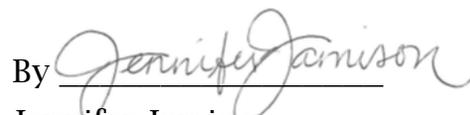
V. Conclusion

OPIC respectfully recommends the Commission find that San Antonio Bay Estuarine Waterkeeper is an affected person and grant its hearing request. OPIC further recommends the Commission refer the relevant and material issues listed in Section IV.B for a contested case hearing at SOAH with a maximum duration of 180 days. Finally, OPIC respectfully recommends the Commission deny the remaining hearing requests.

Respectfully submitted,

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Certificate of Service

I hereby certify that on March 7, 2022, the Office of Public Interest Counsel's Response to Hearing Requests was e-filed with the Chief Clerk of the TCEQ and, in compliance with 30 TAC § 1.11, a copy was served to the Executive Director, the Applicant, and all persons who filed hearing requests and provided addresses. The mailing list used for service was previously filed with the Chief Clerk. Instructions for accessing the mailing list are included in the Executive Director's response filed and served as of this date.


Garrett T. Arthur