

Jon Niermann, *Chairman*
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Bobby Janecka, *Commissioner*
Toby Baker, *Executive Director*



Vic McWherter, Public Interest Counsel

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

June 27, 2022

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

RE: OXY VINYLs, LP
TCEQ DOCKET NO. 2022-0738-IWD
TPDES PERMIT NO. WQ0001539000

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Jamison".

Jennifer Jamison, Attorney
Assistant Public Interest Counsel

DOCKET NO. 2022-0738-IWD

APPLICATION BY	§	BEFORE THE TEXAS
OXY VINYLS, LP	§	COMMISSION ON
FOR A MAJOR AMENDMENT	§	ENVIRONMENTAL QUALITY
OF TPDES PERMIT NO.	§	
WQ0001539000	§	

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

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 Requests for Hearing in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is the application of Oxy Vinyls, LP (Applicant) for a major amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0001539000. The Commission received a timely-filed hearing request and comments from Bayou City Waterkeeper through its Legal Director, Kristen Schlemmer. For the reasons stated herein, OPIC respectfully recommends the denial of the pending hearing request, and that the Commission find that Bayou City Waterkeeper is not an affected person in this matter. Should the Commission find Bayou City Waterkeeper to be an affected person, OPIC recommends referral of Issue Nos. 1-4 specified in Section III. C for a contested case hearing at the State Office of Administrative Hearings (SOAH) with a maximum duration of 180 days.

B. Background of Facility

The Applicant has applied to the TCEQ for a major amendment of Texas Pollutant Discharge Elimination System TPDES Permit No. WQ0001539000 to authorize an increase in the discharge of treated wastewater at a volume not to exceed a daily average flow of 2,400,000 gallons per day via Outfall 001, and an increase in total copper, total lead, total nickel, total zinc and total suspended solids limits via Outfall 001. The draft permit would authorize the discharge of treated process wastewater, utility wastewaters, stormwater, and previously monitored effluent at a daily average flow not to exceed 2,400,000 gallons per day (gpd) via Outfall 001, and stormwater commingled with de minimis quantities of process wastewater and utility wastewaters on an intermittent and flow-variable basis via Outfall 002. The Battleground chlor-alkali manufacturing facility is located on the east side of State Park Road 1836 (Vista Road) approximately 1,000 feet northeast of its intersection with State Highway 134 (Independence Parkway) in the City of La Porte, Harris County, Texas 77571. The treated effluent is discharged via Outfalls 001 and 002 to Phillips Ditch, thence to Santa Ana Bayou, thence to Houston Ship Channel/San Jacinto River Tidal in Segment No. 1005 of the San Jacinto River Basin. The unclassified receiving water uses are minimal aquatic life use for the Phillips Ditch and high aquatic life use for the Santa Ana Bayou. The designated uses for Segment No. 1005 are non-contact recreation and high aquatic life use.

C. Procedural Background

Applicant filed its permit application for a major amendment on December 30, 2019. The TCEQ declared the Application administratively complete on February 3, 2020. Applicant published the Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) in English in the *Houston Chronicle dba Pasadena Citizen* on February 26, 2020, and in Spanish

in *Periódico Información* on February 26, 2020. Following the Executive Director's ("ED") technical review and issuance of a draft permit, Applicant published a Notice of Application and Preliminary Decision (NAPD) in English in the *Houston Chronicle dba Pasadena Citizen*, and in Spanish in *Periódico Información* on November 11, 2021. The comment period ended on December 13, 2021. The Chief Clerk mailed the ED's Decision and Response to Comments ("RTC") on March 8, 2022. The deadline to request a contested case hearing was April 7, 2022.

II. APPLICABLE LAW

The Application was filed after September 1, 2015. Therefore, it is subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under 30, 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 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) 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. Under 30 TAC § 55.203(c), relevant factors to be 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;
- (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 purposes 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 executive director; and

- (3) any other expert reports, affidavits, opinions, or data submitted by the executive director, the applicant, or hearing requestor.

Under 30 TAC § 55.205(b), 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.

Under 30 TAC § 55.211(c)(2)(A)(ii), the Commission shall grant a hearing request made by an affected person 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 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.(d).

III. DISCUSSION

A. Determination of Affected Person Status

Bayou City Waterkeeper

Kristen Schlemmer on behalf of Bayou City Waterkeeper timely filed concurrent comments and a hearing request on December 8, 2021. Bayou City Waterkeeper states that it works with communities affected by flooding and water pollution across the Lower Galveston Bay

watershed and aims to hold industries to the standards set by the Clean Water Act, with the goal of protecting the waters that flow through bayous, creeks, and neighborhoods into our coastal bays. Bayou City Waterkeeper expresses several concerns regarding the draft permit, including whether the major amendment violates anti-backsliding requirements, whether the major amendment complies with proper antidegradation policy, and whether the proposed permit is adequately protective of public health and water quality.

While many of these issues may be relevant and material to the Commission's decision on this application, OPIC finds that Bayou City Waterkeeper did not identify, 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 per § 55.205(b) (2). Because no individual members were identified as affected persons, the ED mapped the address provided for Bayou City Waterkeeper. The address provided is roughly 22 miles from the facility, and 18 miles from the nearest outfall. Accordingly, because Bayou City Waterkeeper has not identified one or more members who would have standing in their own right, as required by § 55.205(b) (2), OPIC is unable to find that Bayou City Waterkeeper has demonstrated affected person status and must respectfully recommend denial of its hearing request. In the event the Commission disagrees and grants a hearing, the sections below discuss the issues raised by the requestor.

B. Issues Raised That Remain Disputed

Bayou City Waterkeeper raised the following disputed issues:

1. Whether the proposed permit amendment violates anti-backsliding requirements by allowing increases in concentration and mass-based effluent limitations for total copper, total lead, total nickel, and total zinc;
2. Whether the proposed permit amendment violates anti-backsliding requirements by allowing increases in the daily average total suspended solids effluent limitations at Outfall 001;

3. Whether the proposed permit amendment complies with applicable antidegradation requirements; and
4. Whether the proposed permit amendment is adequately protective of water quality, aquatic life, and public health without effluent limits and monitoring requirements for mercury.

C. The Disputed Issues are 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 the issues raised are issues of fact.

D. Issues were Raised by the Requestor During the Comment Period

All issues were raised by Bayou City Waterkeeper during the comment period.

E. The Hearing Request is Based on Issues Raised in Public Comments Which Have Not Been Withdrawn

Bayou City Waterkeeper's hearing request was included with its comments, and those timely-filed comments have not been withdrawn.

F. Issues that are Relevant and Material to the Decision on the Application

Bayou City Waterkeeper has raised issues that are relevant and material to the decision on the Application under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii). 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. Relevant and material issues are those governed by the substantive law under which this permit is to be issued. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986). As discussed below, Issue Nos. 1 – 4, in Section III. C. are relevant and material to the Commission's decision on the Application.

Anti-backsliding

The Commission is required to operate the TPDES program in accordance with the Clean Water Act (CWA) and take into consideration published EPA policy. With some exceptions, CWA Section 402(o) (the anti-backsliding provision) broadly prohibits the relaxation of permit limits, standards, and conditions.

Applicant's draft permit proposes effluent limitations that are less stringent than the existing permit. The effluent limitations at issue are water quality based effluent limitations established on the basis of 33 U.S.C. § 1311(b)(1)(C). If the revised effluent limitations are based on state standards, the permit may be modified to contain effluent limitations that are less stringent than the comparable effluent limitations in the previous permit only if a specific exception applies. 33 U.S.C. §§ 1313(d)(4); 1342(o). Such a modification can be authorized if "material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation." 33 U.S.C §§1342(o)(2)(A). Accordingly, Issues No. 1 and 2 are relevant and material to a decision on the application.

Antidegradation Review

The Commission's antidegradation policy and implementation procedures are addressed under 30 TAC § 307.5. The procedures detailed under § 307.5 are central to the Commission's mandate to protect water quality and maintain existing uses of surface water in Texas. Therefore, Issue No. 3 is relevant and material to the Commission's decision regarding this application.

Water Quality, Human Health and Safety

Bayou City Waterkeeper raised concerns about adverse effects to water quality and the consequential impacts on human health. The Commission is responsible for the protection of water quality under Texas Water Code Chapter 26 and 30 TAC Chapters 307 and 309. The Texas Surface

Water Quality Standards (“Standards”) in Chapter 307 require 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, operation of existing industries, and ... economic development of the state....” 30 TAC § 307.1. Additionally, “[s]urface waters must not be toxic to man from ingestion of water, consumption of aquatic organisms, or contact with the skin, or to terrestrial or aquatic life.” 30 TAC § 307.4(d). As Chapter 307 designates criteria for the regulation of water quality and the protection of human health and safety, Issue No. 4 is relevant and material to the Commission’s decision regarding this application.

G. Issues Recommended for Referral

OPIC recommends the hearing request be denied. However, if the Commission grants a hearing, OPIC would recommend referral to SOAH of Issue Nos. 1 – 4 listed in Section III. B.

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, 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. 30 TAC § 50.115(d)(2). If the Commission grants a hearing, OPIC would recommend a hearing duration of 180 days.


IV. Conclusion

OPIC respectfully recommends denial of the pending hearing request because Bayou City Waterkeeper has not demonstrated affected person status. If the Commission disagrees and finds Bayou City Waterkeeper is an affected person, OPIC would recommend referral of Issue Nos. 1 –

4 listed in Section III. B. above for a contested case hearing at SOAH with a maximum hearing duration of 180 days.

Respectfully submitted,


Vic McWherter
Public Interest Counsel

By:  _____

Jennifer Jamison
Assistant Public Interest Counsel
State Bar No. 24108979
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-6363 Phone
(512) 239-637 Fax

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2022, the Office of Public Interest Counsel's Response to Requests for Hearing was filed with the Chief Clerk of the TCEQ and a copy was served to all parties on the attached mailing list via electronic mail, or by deposit in the U.S. Mail.



Jennifer Jamison

MAILING LIST
OXY VINYLs, LP
DOCKET NO. 2022-0738-IWD; PERMIT NO. WQ0001539000

FOR THE APPLICANT:

via electronic mail:

Stephanie Bergeron Perdue
Baker Botts LLP
98 San Jacinto Boulevard, Suite 1500
Austin, Texas 78701
Tel: (512) 322-2544
stephanie.bergeron.perdue@bakerbotts.com

Joseph Nixon
OXY VINYLs, LP
P.O. Box 500
Deer Park, Texas 77536
Tel: (281) 476-2847
joseph_nixon@oxy.com

FOR THE EXECUTIVE DIRECTOR

via electronic mail:

Harrison "Cole" Malley, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division, MC-173
P.O. Box 13087
Austin, Texas 78711
Tel: (512) 239-0600
Fax: (512) 239-0606
harrison.malley@tceq.texas.gov

Michael Redda, Technical Staff
Texas Commission on Environmental
Quality
Water Quality Division, MC-148
P.O. Box 3087
Austin, Texas 78711
Tel: (512) 239-4631
Fax: (512) 239-4430
michael.redda@tceq.texas.gov

Ryan Vise, Deputy Director
Texas Commission on Environmental
Quality
External Relations Division
Public Education Program, MC-108
P.O. Box 13087
Austin, Texas 78711
Tel: (512) 239-4000
Fax: (512) 239-5678
pep@tceq.texas.gov

FOR PUBLIC INTEREST COUNSEL

via electronic mail:

Vic McWherter, Public Interest Counsel
Texas Commission on Environmental
Quality
Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711
Tel: (512) 239-6363
Fax: (512) 239-6377
vic.mcwherter@tceq.texas.gov

FOR ALTERNATIVE DISPUTE
RESOLUTION

via electronic mail:

Kyle Lucas
Texas Commission on Environmental
Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711
Tel: (512) 239-0687
Fax: (512) 239-4015
kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK:

via electronic mail:

Docket Clerk
Texas Commission on Environmental
Quality
Office of Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711
Tel: (512) 239-3300
Fax: (512) 239-3311
www.tceq.texas.gov/goto/efilings

REQUESTER(S):

Kristen Schlemmer
Bayou City Waterkeeper
2010 North Loop West, Suite 103
Houston, Texas 77018