

# BRACEWELL

March 8, 2023

**VIA EFILING**

Laurie Gharis, 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. 2022-1586-IWD  
Rohm and Haas Texas Incorporated  
Water Quality Permit No. WQ0000458000

Dear Ms. Gharis:

Enclosed for filing is the Applicant Rohm and Haas Texas Incorporated's Response to Request for Contested Case Hearing in the above-referenced matter.

Very truly yours,



Whit Swift  
Partner

Enclosure

cc: Mailing List

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**TCEQ DOCKET NO. 2022-1586-IWD**

**APPLICATION BY § BEFORE THE TEXAS COMMISSION**  
**ROHM AND HAAS TEXAS INC. §**  
**FOR MAJOR AMENDMENT WITH § ON**  
**RENEWAL TO TPDES §**  
**PERMIT NO. WQ0000458000 § ENVIRONMENTAL QUALITY**

**ROHM AND HAAS TEXAS INC.’S RESPONSE  
TO REQUEST FOR CONTESTED CASE HEARING**

TO THE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL  
QUALITY:

Applicant Rohm and Haas Texas Incorporated (“Rohm and Haas Texas” or “Applicant”) files this response to the request for contested case hearing on its application (“Application”) for a major amendment with renewal of Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0000458000 (the “Permit”), which authorizes certain discharges at the Rohm and Haas Texas Deer Park Plant. One organization, Bayou City Waterkeeper, filed comments and requested a contested case hearing on the Application. Bayou City Waterkeeper’s request does not support a right to hearing: the request does not identify any individual member who is alleged to have standing, and the request provides only a business address that is approximately 20 miles away from the Deer Park Plant on the far side of Houston. Bayou City Waterkeeper has not demonstrated that it meets the statutory and regulatory requirements for associational standing in a contested case hearing and the Commission should deny its request for contested case hearing.

**I. Introduction**

The Rohm and Haas Texas Deer Park Plant is a chemical manufacturing plant that is located at 1900 Tidal Road, north of State Highway 225 and west of State Highway 134, in the city of Deer Park, Harris County, Texas, 77536. The plant produces bulk and specialty organic chemicals, thermoplastic resins, and hydrogen cyanide.

The Permit authorizes the Rohm and Haas Texas Deer Park Plant to discharge treated process wastewater, stormwater, treated utility wastewaters, sanitary wastewater, utility wastewater, hydrostatic test water from clean tankage, and stormwater from construction activity from various outfalls as identified in the Permit. The outfalls authorized by the Permit discharge directly to the Houston Ship Channel (Outfalls 001, 009, and 011), to the Tucker Bayou portion of the Houston Ship Channel (Outfalls 002 and 004), and to the East Fork Patrick Bayou, thence to Patrick Bayou, thence to the Houston Ship Channel (Outfall 003), in Segment No. 1006 of the San Jacinto River Basin.

Rohm and Haas Texas has applied to the TCEQ for a major amendment with renewal of the Permit. The pending amendment would authorize a revision of the Permit effluent limits to reflect an increase in production and a reconfiguration of the diffuser at Outfall 001, and to revise existing Other Requirement 14 to allow more than *de minimis* discharges at Outfall 009 in certain circumstances.

## **II. Procedural Background**

TCEQ received Rohm and Haas Texas's application for major amendment with renewal of the Permit on July 23, 2020 and declared the application administratively complete on October 28, 2020. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit Amendment ("NORI") for the Application was published in English on November 11, 2020 in the *Houston Chronicle dba Bay Area Citizen*, and in Spanish on November 15, 2020 in *La Paz*. The NORI contained clear and specific instructions for public participation, including how to request a contested case hearing on the application.

The Notice of Application and Preliminary Decision ("NAPD") was published in English on December 22, 2021 in the *Houston Chronicle dba Pasadena Citizen*, and in Spanish on

December 22, 2021 in *La Voz*. Like the NORI, the NAPD also contained clear instructions on how to request a contested case hearing. The public comment period on the Application closed on January 21, 2022.

The Executive Director filed its Response to Public Comment (“RTC”) with the TCEQ Chief Clerk on October 7, 2022, and the Chief Clerk issued a letter dated October 13, 2022 transmitting the RTC and alerting Bayou City Waterkeeper of the Executive Director’s decision that the application meets the requirements of applicable law for permit issuance. The RTC addressed the relevant and material concerns identified by Bayou City Waterkeeper in its comments on the Application.

On February 24, 2023, the Chief Clerk issued a letter stating that the hearing request will be considered by the Commissioners on March 31, 2023. Rohm and Haas Texas hereby provides its response in accordance with Commission rules.

### **III. Legal Standards for Review of Requests for Contested Case Hearing**

Texas law and TCEQ rules identify the legal standard for participation in a contested case hearing, along with the required elements of a valid contested case hearing request. To be granted a contested case hearing, the request must be made by an “affected person,”<sup>1</sup> it must “request a contested case hearing,”<sup>2</sup> and the request must be timely.<sup>3</sup>

#### **A. The Request Must Be Made by an Affected Person**

##### **1. Affected Persons**

The Texas Water Code only allows an “affected person” to participate in a contested case

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<sup>1</sup> 30 TEX. ADMIN. CODE § 55.201(b)(4).

<sup>2</sup> 30 TEX. ADMIN. CODE § 55.201(d)(3).

<sup>3</sup> 30 TEX. ADMIN. CODE § 55.211(c)(2)(B). To be timely, a request for contested case hearing must be filed no later than 30 days after the TCEQ Chief Clerk mails (or otherwise transmits) the Executive Director’s decision and response to comments on an application and draft permit. *See* 30 TEX. ADMIN. CODE § 55.201(a).

hearing on water quality permit applications.<sup>4</sup> The Texas Legislature has defined the universe of “affected persons” who may validly demand that a contested case hearing be held by or on behalf of the Commission. Only those persons who have “a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing” may be granted a hearing.<sup>5</sup> “An interest common to members of the general public does not qualify as a personal justiciable interest.”<sup>6</sup>

TCEQ rules specify the factors that must be considered in determining whether a person is an affected person. Those factors are:

- (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.<sup>7</sup>

Consistent with the Senate Bill 709 changes to the Texas Water Code adopted in 2015, the Commission may consider additional factors in determining whether a person is an affected

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<sup>4</sup> See TEX. WATER CODE § 5.556; 5.115.

<sup>5</sup> TEX. WATER CODE § 5.115(a); *see also* 30 TEX. ADMIN. CODE § 55.203(a).

<sup>6</sup> *Id.*

<sup>7</sup> 30 TEX. ADMIN. CODE § 55.203(c).

person, including:

- (1) the merits of the underlying application and supporting documentation in the commission's 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.<sup>8</sup>

In considering evidence to apply the above factors to a given request, the Third Court of Appeals explained that TCEQ “enjoys the discretion to weigh and resolve matters that may go to the merits of the underlying application, including the likely impact the regulated activity . . . will have on the health, safety, and use of property by the hearing requestor and on the use of natural resources.”<sup>9</sup> TCEQ’s application of the factors described above “may include reference to the permit application, attached expert reports, the analysis and opinions of professionals on its staff, and any reports, opinions, and data it has before it” and specifically may include modeling reports that assess the impact of the proposed emission or discharge.<sup>10</sup> In making these determinations, the court was applying the Texas Supreme Court’s 2013 decision in *Texas Commission on Environmental Quality v. City of Waco*, which affirmed TCEQ’s discretion to rely on such information in making an affected person determination.<sup>11</sup>

## **2. Affected Group or Association**

In certain limited circumstances, a group or association can qualify as an “affected person.” A group or association will only have standing to participate in a contested case hearing if the following four requirements are met:

- (1) comments on the application are timely submitted by the group or

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<sup>8</sup> TEX. WATER CODE § 5.115(a-1); 30 TEX. ADMIN. CODE § 55.203(d).

<sup>9</sup> *Sierra Club v. Tex. Comm'n on Env'tl. Quality*, 455 S.W.3d 214, 223 (Tex. App.—Austin 2014, pet. denied).

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*

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.<sup>12</sup>

A contested case hearing request filed by a group or association must identify an individual who is a member of the group or association who is an “affected person” for purposes of the application and who has a personal justiciable interest in the application that is not an interest shared with members of the general public.

#### **B. The Request Must Be Filed Timely with the TCEQ**

TCEQ rules provide that a request for contested case hearing must be filed no later than 30 days after the Chief Clerk mails (or otherwise transmits) the Executive Director’s decision and RTC and provides instructions for requesting that the Commission reconsider the decision or hold a contested case hearing.<sup>13</sup> TCEQ’s rules do not provide a cure period or other opportunity to correct deficient hearing requests.

#### **C. The Required Elements of a Request for Contested Case Hearing**

TCEQ rules at 30 TEX. ADMIN. CODE § 55.201(d) identify the requirements for a request for contested case hearing:

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. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;

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<sup>12</sup> 30 TEX. ADMIN. CODE § 55.205(b).

<sup>13</sup> 30 TEX. ADMIN. CODE § 55.201(a)&(c).

(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: ...

(B) 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 executive director'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.<sup>14</sup>

TCEQ rules regarding the scope of contested case hearings also provide that the Commission may not refer an issue to SOAH for a contested case hearing unless the Commission determines that the issue:

(1) involves a disputed question of fact or a mixed question of law and fact;

(2) was raised during the public comment period, and, for applications filed on or after September 1, 2015, was raised in a comment made by an affected person whose request is granted; and

(3) is relevant and material to the decision on the application.<sup>15</sup>

#### **IV. Application of the Legal Standards for Review of Contested Case Hearing Requests to the Request filed by Bayou City Waterkeeper**

Bayou City Waterkeeper is the sole commenter and hearing requestor on the Application.

Bayou City Waterkeeper's request for contested case hearing fails to demonstrate that it meets the

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<sup>14</sup> 30 TEX. ADMIN. CODE § 55.201(d).

<sup>15</sup> 30 TEX. ADMIN. CODE § 50.115(c).



requirements for associational standing, and the Commission should deny its contested case hearing request.

Bayou City Waterkeeper has not made the requisite showing that it is an affected group or association. An affected group or association must identify, by name and physical address, one or more members of the group or association that would otherwise have standing to participate in a hearing in their own right.<sup>16</sup> Bayou City Waterkeeper's request for contested case hearing does not identify any individual that it alleges would have standing to challenge the Application, nor does it give the physical address of any individual member. The only members of the association identified in the letter appear in the signature block, and the mailing address provided for the association is a business address that is approximately 20 miles from the Deer Park Plant, on the far side of Houston, and is in no way affected by the discharges from the Permit or the waters into which the Deer Park Plant is authorized to discharge.<sup>17</sup>

Lacking this information about an individual member, the hearing request fails to assert any personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the Application. Likewise, Bayou City Waterkeeper makes no attempt in its comments or hearing request to show an interest in the Application that is not common to members of the general public.

Bayou City Waterkeeper's request also fails to "substantially comply" with the required elements of a contested case hearing request that are set forth in Section 55.201(d) of the

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<sup>16</sup> 30 TEX. ADMIN. CODE § 55.205(b)(2).

<sup>17</sup> Given that the request fails to identify a specific member on which the associational standing is based, the Commission may not be able to apply the factors in 30 Tex. Admin Code § 55.203 to determine if an individual member would be an affected person – for example, the likely impact of the regulated activity on the health and safety of the person, and on the of property of the person; or the likely impact of the regulated activity on the use of the impacted natural resource by the person. See 30 Tex. Admin. Code § 55.203(c)(4)-(5). Using the address provided in the request, the regulated impact will have no impact on the health and safety of any requestor, or on the property of any requestor.

Commission's rules. While two individuals are identified in the signature block and a business address is provided, the request does not provide a written statement explaining in plain language the requestor's location and distance relative to the proposed facility.<sup>18</sup> Nor does the request explain why Bayou City Waterkeeper or any individual member believes that it will be adversely affected by the proposed facility in a manner not common to members of the general public.<sup>19</sup>

The Commissioners may also consider the merits of underlying application and supporting documentation, including whether application meets the requirements for permit issuance, in evaluating requests for contested case hearing.<sup>20</sup> The Executive Director responded to all timely comments made by Bayou City Waterkeeper and made a preliminary decision that the Application meets all statutory and regulatory requirements for issuance of the requested amendment. The merits of the underlying Application and draft permit further support denial of the request for hearing.

Bayou City Waterkeeper fails to meet the requirements for demonstrating affected group or association standing under statute and TCEQ rules, and its request for contested case hearing should be denied.

#### **V. Analysis of Issues Identified in Requestor's Comments and Request for Hearing**

Bayou City Waterkeeper raised several issues in the comments it filed between the first and second public comment periods. The issues are addressed in the Executive Director's RTC and none of the issues were withdrawn. Because Bayou City Waterkeeper failed to meet its affected association requirements established in the Texas Water Code and TCEQ regulations, Applicant urges the Commission to deny the request for contested case hearing and not refer the application

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<sup>18</sup> 30 TEX. ADMIN. CODE § 55.201(d)(2).

<sup>19</sup> *Id.*

<sup>20</sup> TEX. WATER CODE § 5.115(a-1); 30 TEX. ADMIN. CODE § 55.203(d)(1).

to the State Office of Administrative Hearings (“SOAH”) for a contested case hearing. However, in the event the Commission were to grant a hearing, Applicant’s analysis of the issues and suggested appropriate length of hearing are set out below.

**1. Whether Public Participation Requirements Have Been Met**

Bayou City Waterkeeper commented that the application, draft permit and fact sheet were not publicly available in the public viewing location indicated in the public notice. As a result, they assert that public participation requirements were not met. TCEQ rules require that the applicant make a copy of the application available for viewing on the first day of publication of the NORI in a newspaper of record.<sup>21</sup> The first day of newspaper publication of the NORI was November 11, 2020. Applicant placed a copy of the application in the Deer Park Public Library in Deer Park, Texas, prior to newspaper publication of the NORI.

TCEQ rules also require that the applicant make a copy of the complete application (including any subsequent revisions to the application) and the Executive Director’s preliminary decision (draft permit and fact sheet) available for viewing on the first day of publication of the NAPD in a newspaper of record.<sup>22</sup> The date of newspaper publication of the NAPD was December 22, 2021. The Bayou City Waterkeeper comment letter and hearing request is dated December 9, 2021, almost two weeks prior to the date of newspaper publication of the NAPD. No obligation existed for the application, draft permit, and fact sheet to be available for public viewing prior or on the date that the comments were filed. The comment period ran from December 22, 2021 to January 21, 2022. The NAPD Public Notice Verification Form filed in this matter verifies that the complete application and draft permit (the Executive Director’s preliminary decision) were available for viewing in the Deer Park Public Library by December 22, 2021, and there is no

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<sup>21</sup> 30 TEX. ADMIN. CODE § 39.405(g)(1).

<sup>22</sup> 30 TEX. ADMIN. CODE § 39.405(g)(2).

evidence in the record that the required documents were not available in a public location as required by rule. No additional comments were filed by Bayou City Waterkeeper after or during the actual public comment period. For this reason, and lacking any allegation that the documents were not available during the second public comment period, this is not a material disputed issue of fact. The record in this matter indicates that public notice requirements were fulfilled.

If this issue is referred to SOAH, Applicant requests that it be described as follows: “Whether the application, draft permit, and fact sheet were available for public viewing in accordance with 30 T.A.C. § 39.405(g)(2).”

**2. Whether TCEQ Is Required to Publish Applications for TPDES Permits and Draft Permits and Fact Sheets in Electronic Format during the Comment Period.**

Applicant submits that this issue is not appropriate for referral to SOAH as it raises no disputed issue of fact specific to this proceeding. The comment is instead an issue related to actions of the TCEQ and its statutory and regulatory requirements.

**3. Whether the Executive Director Performed a Sufficient Antidegradation Review for This Permit Amendment**

The NAPD standard language that provides notice of the antidegradation review states that the antidegradation review is a “preliminary determination” that may be modified if new information is received. In its comment, Bayou City Waterkeeper incorrectly interprets this standard notice language to mean that the Executive Director only conducted a “preliminary” antidegradation review and goes on to assert that a preliminary review is not sufficient to meet the TCEQ’s obligation to conduct an antidegradation review for the permit. Bayou City Waterkeeper’s interpretation of the antidegradation review that the Executive Director conducts in response to an application for major amendment to an industrial wastewater permit is incorrect. The Executive Director conducted a thorough and adequate antidegradation review of the changes

requested to be made in the application to amend the permit to ensure that the application and the draft permit comply with the antidegradation policy as set out in 30 T.A.C. § 307.5.

The RTC extensively discusses the multi-step process and multiple technical reviews undertaken by TCEQ staff in the antidegradation review. The results of the antidegradation review that the Executive Director performed are summarized in the NAPD and in the fact sheet, and discussed at length in response to Comment 3 in the Executive Director's RTC.<sup>23</sup> The TCEQ's antidegradation review fully complies with the Texas Surface Water Quality Standards at 30 T.A.C. § 307.5 and the *Procedures to Implement the Texas Surface Water Quality Standards* (RG-194, June 2010).

To the extent the issue is referred to SOAH, the Applicant requests that it be described as follows: "Whether the Executive Director's antidegradation review that is the basis for water quality-based requirements in the draft permit complied with applicable requirements of 30 T.A.C. § 307.5."

#### **4. Concern Regarding Compliance History of the Applicant**

Bayou City Waterkeeper comments that the Applicant's compliance history merits either denial of the requested amendment or the inclusion of additional permit requirements. Bayou City Waterkeeper further suggests that the TCEQ should require that the applicant come into compliance with all state and federal environmental regulations prior to issuance of the amendment.

As required by TCEQ rule,<sup>24</sup> the Executive Director utilizes compliance history when making decisions regarding permit issuance, and has done so as part of its technical review of the

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<sup>23</sup> See TCEQ Permit No. WQ0000458000, Executive Director's Response to Comments, p. 11-14 (Oct. 7, 2022) (available on the TCEQ Commissioners' Integrated Database under Docket No. 2022-1586-IWD at <<https://www14.tceq.texas.gov/epic/eCID/index.cfm>>).

<sup>24</sup> 30 TEX. ADMIN. CODE § 60.1(a).

Application. The Executive Director has established a program for the assessment of a regulated entity's compliance history in Chapter 60 of the Commission's rules. The RTC states that the Executive Director assessed the Applicant's compliance history as part of its technical review of this application and determined that the Applicant is a satisfactory performer.<sup>25</sup> As a satisfactory performer, the Applicant is considered to generally comply with environmental regulations,<sup>26</sup> and the Applicant's compliance history does not merit denial of the Application or the inclusion of additional permit requirements.

To the extent the issue is referred to SOAH, the Applicant requests that it be described as follows: "Whether the applicant's compliance history merits denial of the application or the inclusion of additional permit requirements."

#### **VI. Minimum Duration of Hearing**

Should the Commission decide to refer this case to SOAH for a hearing, given the limited number and scope of issues that Applicant believes may be appropriate for this case, the maximum expected duration of a hearing on this application and draft permit should be no longer than six months after the first date of the preliminary hearing until the proposal for decision is issued.

#### **VII. Conclusion and Prayer**

For the reasons discussed above, Rohm and Haas Texas respectfully requests that the Commission deny the contested case hearing request, adopt the Executive Director's Response to Public Comments, and issue the major amendment with renewal of TPDES Permit No. WQ0000458000.

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<sup>25</sup> See TCEQ Permit No. WQ0000458000, Executive Director's Response to Comments, p. 14-15 (Oct. 7, 2022) (available on the TCEQ Commissioners' Integrated Database under Docket No. 2022-1586-IWD at < <https://www14.tceq.texas.gov/epic/eCID/index.cfm> >).

<sup>26</sup> 30 TEX. ADMIN. CODE § 60.2(a)(2).

Respectfully Submitted,



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ATTORNEYS FOR ROHM AND HAAS  
TEXAS, INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of Rohm and Haas Texas Inc.'s Response to Request for Contested Case Hearing was electronically filed with the Texas Commission on Environmental Quality on March 8, 2023. I further certify that copy of the foregoing was sent to all persons on the attached mailing list either through U.S. mail or email.



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Whitney L. Swift



**MAILING LIST  
ROHM AND HAAS TEXAS INC.  
DOCKET NO. 2022-1586-IWD; PERMIT NO. WQ0000458000**

**FOR THE EXECUTIVE DIRECTOR**

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