

Jon Niermann, *Chairman*
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Bobby Janecka, *Commissioner*
Erin E. Chancellor, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 8, 2023

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: **ROHM AND HAAS TEXAS INCORPORATED (APPLICANT)**
TCEQ DOCKET NO. 2022-1586-IWD

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in black ink that reads "Pranjal".

Pranjal M. Mehta, Attorney
Assistant Public Interest Counsel

cc: Mailing List

TCEQ DOCKET NO. 2022-1586-IWD

**APPLICATION BY ROHM AND
HAAS TEXAS INCORPORATED
FOR TPDES PERMIT NO.
WQ0000458000**

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**BEFORE THE
TEXAS COMMISSION
ON
ENVIRONMENTAL QUALITY**

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

I. INTRODUCTION

A. Summary of Position

The TCEQ Chief Clerk’s office received one timely hearing request from Kristen Schlemmer on behalf of Bayou City Waterkeeper. For the reasons discussed herein, OPIC recommends denial of the hearing request.

B. Background of Facility

Rohm and Haas Texas Incorporated (Applicant) applied for a major amendment with renewal of existing Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0000458000, to revise the effluent limits to reflect an increase in production and a reconfiguration of the diffuser at Outfall 001, and to revise existing Other Requirement No. 14 to allow more than *de minimis* discharges at Outfall 009 in certain circumstances. The Applicant currently operates Rohm and Haas Texas Deer Park Plant (the facility), a chemical manufacturing

plant that produces bulk and specialty organic chemicals, thermoplastic resins, and hydrogen cyanide. As described in the application, the facility 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, 77536.

The treated effluent would be discharged via Outfalls 001, 009, and 011 directly to the Houston Ship Channel Tidal; via Outfalls 002 and 004 to the Tucker Bayou portion of the Houston Ship Channel Tidal; via Outfall 003 to East Fork Patrick Bayou, then to Patrick Bayou, then to the Houston Ship Channel Tidal in Segment No. 1006 of the San Jacinto River Basin.

C. Procedural Background

The TCEQ received the application on July 23, 2020, and declared it administratively complete on October 28, 2020. The Notice of Receipt and Intent to Obtain a Water Quality Permit (NORI) was published in the *Houston Chronicle dba Bay Area Citizen* on November 11, 2020, and a Spanish language notice was published in *La Voz* on November 15, 2020. The Executive Director (ED) completed the technical review of the application on October 4, 2021. The Notice of Application and Preliminary Decision (NAPD) was published in the *Houston Chronicle dba Pasadena Citizen* on December 22, 2021, and a Spanish language notice was published in *La Voz* on December 22, 2021. The public comment period for this application closed on January 21, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments on October 13, 2022. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED's decision was November 14, 2022. The Commission received one timely filed hearing request, as discussed below.

II. APPLICABLE LAW

The application was filed after September 1, 2015, and is therefore 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, 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) 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.

30 TAC § 55.201(d).

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. 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.

30 TAC § 55.203(c).

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

30 TAC § 55.203(d).

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), for an application filed on or after September 1, 2015, 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 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.

III. DISCUSSION

A. Determination of Affected Person Status

On December 9, 2021, Kristen Schlemmer submitted a hearing request on behalf of Bayou City Waterkeeper (BCW). BCW works with communities affected by flooding and water pollution across the Lower Galveston Bay watershed. BCW's goal is to protect the waters that flow through bayous, creeks, and neighborhoods into the coastal bays and to hold industries to the standards set

by the Clean Water Act. The hearing request raised concerns about potential impacts on water quality and public health.

As required for group standing under 30 TAC § 55.205(b), BCW timely submitted comments, and the interests BCW seeks to protect are germane to its purpose. However, BCW's hearing request did not identify a member, by name and physical address, who would otherwise have standing to request a hearing in their own right as required under 30 TAC § 55.205(b)(2). In the absence of identification of any group member in its hearing request, OPIC cannot find that BCW's hearing request meets the requirements for group standing. Therefore, OPIC cannot find that BCW qualifies as an affected person. However, if the Commission finds BCW to be affected, OPIC provides the following analysis of the issues raised in BCW's hearing request.

B. Issues Raised in the Hearing Request

BCW raised the following issues:

1. Whether the Applicant failed to provide adequate public notice as required by 30 TAC § 39.405(g) by failing to make the application documents available at a public site.
2. Whether the draft permit complies with applicable antidegradation requirements.
3. Whether the draft permit should be altered based on the facility's compliance history.

C. Issues Raised in the Hearing Request Remain Disputed

There is no agreement between the hearing requestor and the ED on the issues raised in the hearing request; therefore, they remain disputed.

D. Whether 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). The issues listed above are issues of fact.

E. Issues Raised During the Comment Period

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

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

The hearing request is based on timely comments that have not been withdrawn.

G. Issues That are Relevant and Material to the Decision on the Application

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 a permit. The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law relating to the permit at issue. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

Public Notice

Under 30 TAC § 39.405(g), the applicant must make a copy of the application available for review and copying at a public place in the county in which the facility is located or proposed to be located. Therefore, Issue No. 1 is relevant and material.

Antidegradation

The Commission is responsible for the protection of water quality under Texas Water Code (TWC) Chapter 26 and 30 TAC Chapters 307 and 309. These responsibilities include ensuring compliance with the Texas Surface Water Quality Standards. The purpose of these standards is to "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. Also, "[a] permit must contain effluent limitations that protect existing uses and preclude degradation of existing water quality." 30 TAC § 307.2(d)(5)(D). Therefore, Issue No. 2 regarding antidegradation is relevant and material.

Compliance History

The Commission must consider Applicant's compliance history when determining whether to grant this application. *See* Tex. Water Code § 5.754(i). Therefore, Issue No. 3 is relevant and material.

H. Referrable Issues

For the reasons stated above, should the Commission decide that BCW is an affected person, the following issues would be appropriate for referral.

1. Whether the Applicant failed to provide adequate public notice as required by 30 TAC § 39.405(g) by failing to make the application documents available at a public site.
2. Whether the draft permit complies with applicable antidegradation requirements.
3. Whether the draft permit should be altered based on the facility's compliance history.

IV. CONCLUSION

For the reasons discussed above, OPIC recommends the Commission deny the hearing request of BCW. If the Commission grants a hearing, the issues specified in Section III.H could be appropriately referred to SOAH for a contested case hearing.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2023, the foregoing document was filed with the TCEQ Chief Clerk, and copies were served to all parties 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

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TCEQ Docket No. 2022-1586-IWD

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