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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

March 20, 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: **IN THE MATTER OF THE APPLICATION BY CHAMBERS COUNTY
IMPROVEMENT DISTRICT NO. 1 FOR PERMIT NO.
WQ0005341000
TCEQ DOCKET NO. 2023-0322-IWD**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in black ink, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0322-IWD

APPLICATION BY	§	BEFORE THE
CHAMBERS COUNTY	§	
IMPROVEMENT DISTRICT NO. 1	§	TEXAS COMMISSION ON
FOR NEW TPDES PERMIT	§	
NO. WQ0005341000	§	ENVIRONMENTAL QUALITY

**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE
TO REQUEST FOR HEARING AND REQUEST FOR RECONSIDERATION**

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (“OPIC”) at the Texas Commission on Environmental Quality (“the Commission” or “TCEQ”) files this Response to Request for Hearing and Request for Reconsideration in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Preliminarily, OPIC notes that the TCEQ Chief Clerk’s office received one timely hearing request and request for reconsideration from the group Clean Water Action (“CWA”). As discussed herein, OPIC respectfully recommends granting CWA’s hearing request and referring this application for a 180-day hearing at the State Office of Administrative Hearings (“SOAH”) on Issue nos. 1–5 contained in Section III.B. OPIC further recommends the Commission deny the pending request for reconsideration.

B. Background of Facility

Chambers County Improvement District No. 1 (“Applicant” or “Chambers”) applied to TCEQ for a new Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0005341000 (the “proposed Permit”) to authorize the discharge of treated domestic and nonhazardous industrial wastewater, at a daily average flow of 960,000 gallons per day in Interim

Phase I, a daily average flow of 1.92 million gallons per day (“MGD”) in Interim Phase II, a daily average flow of 4.42 MGD in Interim Phase III, a daily average flow of 6.92 MGD in Interim Phase IV, and a Final Phase flow limit of 9.42 MGD.

If this permit is ultimately issued, the wastewater treatment facility (the “proposed Facility”) will be located approximately 1.5 miles east of the intersection of FM 1405 and South Road, southeast of the City of Baytown, Chambers County. The treated wastewater would be discharged via pipeline directly to Upper Galveston Bay in Segment No. 2421 of the Bays and Estuaries. The designated uses for Segment No. 2421 are primary contact recreation, high aquatic life use, and oyster waters. A dissolved oxygen criterion of 4.0 milligrams per liter (“mg/l”) also applies to the Segment.

The proposed Facility’s wastewater system will include an activated sludge treatment system consisting of headworks, which include mechanical screens and odor treatment, oil and water separation, aerated equalization tanks, and biological treatment in the form of aeration tanks in the activated sludge process, clarifiers, filtration units, and ultraviolet disinfection. The treated wastewater (effluent) will be pumped through pipes combining in the junction box and discharged through a submerged diffuser. Sludge treatment prior to off-site disposal will involve the use of gravity thickener, aerobic digester, and belt filter press.

The effluent limitations for all five phases of the proposed permit are voluminous and OPIC will not restate them here. They are described in the Executive Director’s (“ED”) Response to Public Comment (“RTC”), which is available for public viewing and download on TCEQ’s website.¹

¹ The ED’s Response to Public Comment (“RTC”) is accessible for public download by searching the TCEQ Commissioner’s Integrated Database for Permit No. WQ0005341000 at the following link: <https://www14.tceq.texas.gov/epic/eCID/>.

C. Procedural Background

TCEQ received the application on November 18, 2021. On December 22, 2021, the ED declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published in Spanish on December 26, 2021 in *El Perico* and in English on January 2, 2022 in the *Baytown Sun*. The ED completed the technical review of the application on June 22, 2022 and prepared the proposed Permit, which if approved, would establish the conditions under which the proposed Facility must operate. The Notice of Application and Preliminary Decision was published in English on August 2, 2022 in the *Baytown Sun* and in Spanish on August 4, 2022 in *El Perico*. The public comment period ended on September 6, 2022. The Chief Clerk mailed the ED's Decision and Response to Comments on November 28, 2022. The deadline for filing requests for a contested case hearing and requests for reconsideration of the Executive Director's decision was December 28, 2022.

The Commission received one request for a contested case hearing and request for reconsideration from the group Clean Water Action ("CWA").

II. APPLICABLE LAW

A. Requests for Reconsideration

Any person may file a request for reconsideration of the ED's decision under Title 30, Texas Administrative Code ("TAC") § 55.201(e). The request must be in writing and filed with the Chief Clerk no later than 30 days after the Chief Clerk mails the ED's decision and RTC. The request must expressly state that the person is requesting reconsideration of the ED's decision and give reasons why the decision should be reconsidered.

B. Requests for Hearing

This application was filed on or 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

Title 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).

As provided by 30 TAC § 55.205(a), a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and

- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

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.

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 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.

III. HEARING REQUEST

A. Determination of Affected Person Status

Clean Water Action (“CWA”) submitted timely comments and a request for hearing through its counsel, Eric Allmon. Concerns raised by the group in both timely comment and hearing request relate to water quality, monitoring, odor, inconsistency with TCEQ's Coastal

Management Plan, and the adequacy of requirements related to cooling water intake structures. These interests are protected by the law under which this application will be granted. CWA is a national organization of “diverse people and groups joined together to protect our environment, health, economic well-being and community quality of life.”² Its goals include protecting water and health through strong and effective clean water laws.³ OPIC finds the interests CWA seeks to protect are germane to its purpose, and neither the claim asserted nor the relief requested requires the participation of individual group members. To comply with the requirement that the hearing request identify, by name and address, members who would otherwise have standing to request a hearing in their own right, CWA offers members Dakshina Jandhyala, Kevin Topek, and John Chandler.

The request indicates that Dakshina Jandhyala has kayaked and fished in Galveston Bay for several years. According to the map provided by ED staff, Dr. Jandhyala’s residence is located approximately 30 miles from the proposed Facility and outfall.

The request describes Kevin Topek as an “avid oyster consumer from the waters of Galveston Bay.” He also harvests oyster shells and recreates in Galveston Bay by fishing, wading, and boogie boarding. The request did not provide Mr. Hudson’s address; consequently the ED was unable to map his location relative to the proposed Facility.

Finally, the request states that John Chandler has fished and boated in Galveston Bay for many years. According to the ED’s map he is located approximately 47 miles from the proposed Facility and outfall.

² Information about Clean Water Action’s Purpose and Mission Statement may be obtained at: <https://cleanwater.org/who-we-are> (last accessed March 15, 2023).

³ *Id.*

As stated *supra*, a group or association must identify members with standing to request a hearing in their own right. Establishing standing requires, *inter alia*, that a reasonable relationship exist between the interest claimed and the regulated activity that is distinguishable from the general public. The distance shown in the ED's map between the residences of the identified members and the regulated activity is too remote to establish a reasonable relationship based on their property interests. However, these members also establish regular and particular recreational interests that take place in close proximity to the proposed discharge point. The large volume of discharge, including a Final Phase flow limit of 9.42 MGD, underscores the potential range of effects on these interests. Because the recreational activities of the identified members take place regularly; include consumption of fish, oysters, and other aquatic life; and because those activities could be impacted by the proposed discharge authorized under the draft Permit, OPIC finds a reasonable relationship exists between the identified recreational interests and the Commission's regulation of the proposed Facility. These interests are sufficient to confer a finding of affectedness, and CWA has therefore met its final requirement for group standing and qualifies as an affected person.

B. Issues Raised in the Hearing Request of the Affected Person

The affected person discussed above raised the following issues in both comment and request:

1. Whether the proposed Facility and draft permit will adversely impact water quality in violation of applicable rules and statutes, including consistency with the applicable total maximum daily load for bacteria and compliance with the Tier 2 Antidegradation Review requirements?
2. Whether issuance of the draft permit is consistent with the goals and policies of the Texas Coastal Management Program?
3. Whether the draft permit includes adequate monitoring requirements, including Whole Effluent Toxicity (WET) testing requirements?
4. Whether the draft permit contains adequate requirements related to cooling water intake structures?

5. Whether the draft permit complies with applicable requirements to abate and control nuisance odors?

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; thus, 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 Were Raised by the Requestor During the Comment Period

Issue nos. 1–5 in Section III.B were raised by the affected person 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

The issues raised by CWA are relevant and material to the Commission’s decision under the requirements of 30 TAC §§ 55.201(d)(4) and 55.211(c)(2)(A). 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. The Commission can only consider issues within its jurisdiction. Therefore, relevant and material issues include those governed by the substantive law of the permit at issue. *Anderson v. Liberty Mutual, Inc.*, 477 U.S. 242, 248-51 (1986).

Water Quality

CWA is concerned that the proposed discharge may adversely impact water quality and does not comply with applicable rules and statutes, including total maximum daily loads and Tier 2 Antidegradation Review requirements.

The Commission is responsible for the protection of water quality under TWC Chapter 26 and 30 TAC Chapter 307. 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. According to § 307.6(b)(4) of the Standards, “[w]ater in the state must be maintained to preclude adverse toxic effects on aquatic life, terrestrial life, livestock, or domestic animals, resulting from contact, consumption of aquatic organisms, consumption of water, or any combination of the three.” 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).

A Total Maximum Daily Load for Bacteria has been approved for Segment No. 2421, and Galveston Bay is subject to specific waste load allocations to limit *Enterococci*.⁴ Furthermore, antidegradation reviews are governed by 30 TAC § 307.5, which establishes the Commission’s antidegradation policy and contains provisions for implementation of the policy. For this application, the ED performed a Tier 2 Antidegradation Review and preliminarily determined that no significant degradation of water quality is expected in Upper Galveston Bay.⁵ Therefore, Issue no. 1 is relevant and material to the Commission’s decision regarding this application and appropriate for referral to SOAH.

⁴ See ED’s RTC, p. 11.

⁵ See ED’s RTC, p. 13.

Texas Coastal Management Program

CWA is concerned that the proposed Facility is not consistent with the Texas Coastal Management Program. 30 TAC Chapter 281, Subchapter B requires a determination of whether the proposed Facility is consistent with the Texas Coastal Management Program, including its goals and policies. Therefore, Issue no. 2 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Monitoring Requirements

CWA is concerned about the draft permit's monitoring requirements, specifically those related to 40 Code of Federal Regulations (C.F.R.) Part § 437.4(a) and WET testing. The draft permit is indeed subject to, and requires certification of compliance with, the monitoring requirements contained in 40 CFR Part § 437.4(a). Additionally, the draft permit requires WET testing. Therefore, Issue no. 3 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Cooling Water Intake Structures

CWA is concerned about whether the draft permit contains adequate provisions related to cooling water intake structures. U.S. Clean Water Act § 316(b) requires the submittal of specific application materials by an industrial facility which uses or proposes to use water for cooling purposes. However, according to the ED, the Applicant will not use any cooling water intake structures and the Application does not indicate the use of water from any source that would require a cooling water intake structure. A disputed question of fact—upon which SOAH could properly make a finding—exists as to whether the proposed Facility's activities require the use of cooling water intake structures. Therefore, Issue no. 4 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

Nuisance Odors

CWA is concerned that the draft permit does not include adequate odor prevention requirements. TCEQ regulates this issue under 30 TAC § 309.13(e), which requires applicants to implement a nuisance odor abatement plan. The permit does not allow the permit holder to create or maintain a nuisance that interferes with a landowner's use and enjoyment of his or her property. Because 30 TAC § 309.13 addresses nuisance odors, Issue No. 5 is relevant and material to the Commission's decision on this Application.

H. Issues Recommended for Referral

For the reasons discussed above, OPIC recommends referring Issue nos. 1–5 in Section III.B to SOAH for a contested case hearing.

I. 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). 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 would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. REQUEST FOR RECONSIDERATION

CWA submitted a timely request for reconsideration of the ED's decision. The group requested that the Commission reconsider the application and ensuing draft permit on the basis that it is deficient in regard to water quality, monitoring, odor, and cooling water intake structures. CWA also argues that the application and draft permit are inconsistent with TCEQ's Coastal Management Plan. An evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the ED's decision should be denied based on these concerns. As discussed above, OPIC is recommending that these issues be referred for a contested case hearing. For these reasons, OPIC respectfully recommends denial CWA's request for reconsideration.

V. CONCLUSION

OPIC respectfully recommends that the Commission grant the hearing request of Clean Water Action and refer Issue nos. 1-5 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days. Finally, OPIC recommends the Commission deny the pending request for reconsideration.

Respectfully submitted,

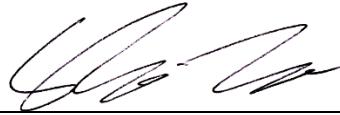
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CERTIFICATE OF SERVICE

I hereby certify that March 20, 2023, the original of the Office of Public Interest Counsel's Response to Request for Hearing and Request for Reconsideration was filed with the Chief Clerk of the TCEQ and a copy was served on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.



Sheldon P. Wayne

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TCEQ DOCKET NO. 2023-0322-IWD

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