

WQ
126556

Debbie Zachary

From: PUBCOMMENT-OCC
Sent: Friday, August 12, 2022 8:42 AM
To: PUBCOMMENT-OCC2; PUBCOMMENT-OPIC; PUBCOMMENT-ELD; PUBCOMMENT-WQ
Subject: FW: Public comment on Permit Number WQ0002659000
Attachments: Kinder Morgan Petcoke Comment.docx1.pdf

PM
H

From: kristen@bayoucitywaterkeeper.org <kristen@bayoucitywaterkeeper.org>
Sent: Thursday, August 11, 2022 10:23 PM
To: PUBCOMMENT-OCC <PUBCOMMENT-OCC@tceq.texas.gov>
Subject: Public comment on Permit Number WQ0002659000

REGULATED ENTY NAME SIMS BAYOU TERMINAL

RN NUMBER: RN101610376

PERMIT NUMBER: WQ0002659000

DOCKET NUMBER:

COUNTY: HARRIS

PRINCIPAL NAME: KINDER MORGAN PETCOKE LP

CN NUMBER: CN602846735

FROM

NAME: Kristen Schlemmer

EMAIL: kristen@bayoucitywaterkeeper.org

COMPANY: Bayou City Waterkeeper

ADDRESS: 2010 NORTH LOOP W STE 103
HOUSTON TX 77018-8106

PHONE: 5126191583

FAX:

COMMENTS: Please see attached comments, request for a public meeting, and request to be added to the mailing list for this permit amendment by Bayou City Waterkeeper, Public Citizen, and the Healthy Port Communities Coalition, and Bayou City Waterkeeper's request for contested case hearing.



August 11, 2022

Office of the Chief Clerk, Texas Commission on Environmental Quality
Comments submitted electronically via www.tceq.gov/epic/eComment/.

Re: Major Amendment to TPDES Permit No. WQ0002659000 / Bayou City Waterkeeper, Public Citizen, and the Healthy Port Communities Coalition's Comments and Request for Public Meeting, and Bayou City Waterkeeper's Request for Contested Case Hearing

Bayou City Waterkeeper ("BCWK"), Public Citizen, and the Healthy Port Communities Coalition ("HPCC") submit these comments to the proposed major amendment to TPDES Permit No. WQ0002659000, and request a public meeting and a contested case hearing on this matter.

BCWK is a non-profit organization working at the intersection of conservation and environmental justice to improve water quality, preserve wetlands, and create resilience to flooding and climate change across the greater Houston region. **Public Citizen** is a nonprofit consumer advocacy organization that champions the public interest in the halls of power with 500,000 members and supporters throughout the country. Public Citizen's Texas office works to protect the health and prosperity of our communities and families. Public Citizen is a founding member of the **Healthy Port Communities Coalition**, which seeks to improve the health and well-being of communities in and around the Houston Ship Channel. HPCC is focused on creating a healthier Houston by preventing pollution before it happens.

1. Kinder Morgan's permit amendment application does not provide information required for effective public comment

BCWK, Public Citizen, and HPCC cannot effectively comment on the proposed permit addition because Kinder Morgan has not provided the necessary information required by Texas regulations. Under federal and Texas law, major amendments to an existing TPDES permit must include a Stormwater Pollution Prevention Plan (SWPPP). *See* 40 C.F.R. § 122.26(b)(14)(viii); *see also* 30 T.A.C. 281.25(a)(4). These plans must describe the Best Management Practices (BMPs) that a facility will employ to control discharges of pollutants via stormwater discharges. SWPPPs provide critical information on how the facility will reduce the amount of pollutants present in stormwater, ensure the implementation of these practices, and assure compliance with the permit's terms and conditions. Without a concrete and detailed plan that describes a credible path to compliance, the proposed permit amendment lacks critical information needed to assess

its compliance with federal and Texas requirements. The Kinder Morgan permit does not include such a plan. TCEQ should therefore reject the proposed permit amendment until Kinder Morgan supplies this information and publishes it for public review.

Additionally, the permit application does not address the expected volume of Contact and Non-contact Stormwater Discharges. The application lists the expected amount of stormwater discharge as “[v]ariable.” While we acknowledge that rainfall amounts can vary, the application must nonetheless describe the conveyances that deliver effluent to Kinder Morgan’s retention pond (and eventually to Sims Bayou) as well as quantify the volume of those discharges to assure they will comply. For example, the pH value of Kinder Morgan’s discharges must fall between 6.0 and 9.0 to comply with federal regulations concerning petroleum refining point sources. 40 C.F.R. §419.12(a). Kinder Morgan’s application indicates that it has performed four pH samples from its outfall which measured: 8.6, 8.8, 8.5, and 8.7. As a result, Kinder Morgan’s outfall barely falls within federal discharge limits, and a major storm event that sends high volumes of contact stormwater through the facility would likely result in a foreseeable and preventable violation of Texas regulatory discharge limits. Kinder Morgan therefore must provide sufficient information to determine how the new conveyances will affect the content of its discharges.

Further, the Kinder Morgan permit application does not include the underlying worksheets that support its conclusions on discharge characteristics. BCWK, Public Citizen, and HPCC lack the fair opportunity to provide informed comment on the proposed permit without the content of these worksheets.

2. Kinder Morgan’s major amendment conflicts with Texas’s antidegradation policy set forth under 30 Tex. Admin. Code § 307

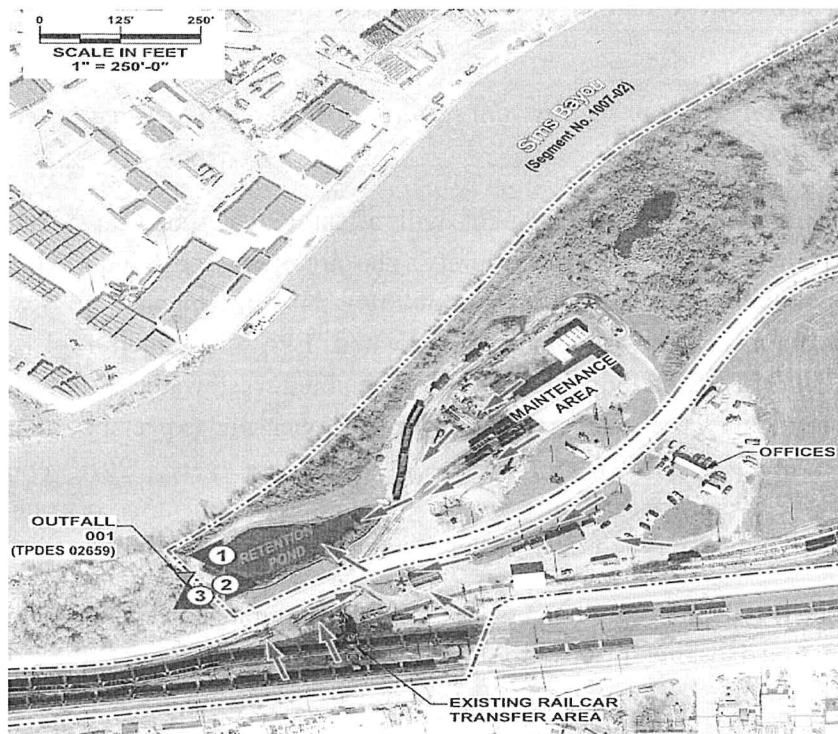
Sims Bayou is an impaired waterbody under Section 303(d) of the federal Clean Water Act (CWA). To restore the waterbody to its designated use, TCEQ has designated a Total Maximum Daily Load (TMDL) for Sims Bayou and identified a Waste Load Allocation that it can absorb without impairing its use. As TCEQ’s own regulations note, “it is the policy of [the state of Texas] . . . to maintain the quality of water in the state consistent with public health and enjoyment, propagation and protection of terrestrial and aquatic life. . . .” 30 T.A.C. § 307.1. Section 307.5(b)(4) adds that “[d]ischarges that cause pollution that are authorized by the Texas Water Code, the federal Clean Water Act, or other applicable laws must not lower water quality to the extent that the Texas Surface Water Quality Standards are not attained.” 30 T.A.C. § 307(b)(4). TCEQ can judge surface water conditions through narrative criteria such as: the taste and odor of the water, suspended solids, turbidity, and the presence of oil and grease. Tier 1 review requires the TCEQ to take these factors into consideration when approving a permit. *See June 2010 Procedures to Implement the Texas Surface Water Quality Standards*, pg. 57.

TCEQ must evaluate how Kinder Morgan's discharges under the permit amendment comply, or violate, these standards. Because its wastewater discharges contact the petroleum coke ("petcoke") managed at the site, those discharges would seriously affect the quality and aesthetics of Sims Bayou and other nearby waters. Given its insoluble nature, petcoke can float on the bayou's surface of the water, remain suspended in it, and settle to its bottom and remain isolated and entrained in the bayou's sediments. Even the layperson without technical understanding of water quality can appreciate how this would severely affect the aesthetics and quality of Sims Bayou's waters.

The Kinder Morgan facility is located within the 100-year floodplain. Its proximity to Sims Bayou belies any notion that Outfall 001's filtration system would sift out potential petcoke contamination. At the least the close proximity of Kinder Morgan's retention pond to Sims Bayou means that a large rain event would directly scour oil and grease contamination into the waterbody without better controls. The likely routes of exposure and discharge would directly conflict with Texas' antidegradation policy and regulatory requirements.

3. Given Kinder Morgan's prior self-report of eight different permit violation events, its major permit modification request effectively seeks impermissible immunity from liability for these prior violations

Kinder Morgan's facility currently has eight active violations for "failure to meet the limit for one or more permit parameter[s]." While TCEQ's website lists Kinder Morgan's compliance history as "Satisfactory," its compliance history rating from TCEQ is a 57.00. According to the



TCEQ's own guidance, this rating means Kinder Morgan's performance should be classified as "Unsatisfactory," since it is greater than 55.00. A facility that falls within TCEQ's "Unsatisfactory" range is greater than 55.00, meaning it "fails to comply with a significant portion of the relevant environmental regulations." TCEQ, *Compliance History: How It Works (RG-457)* (2021). This rating may prevent a facility from acquiring a permit renewal and higher penalties during enforcement. *Id.*

Given Kinder Morgan's eight active violations and rating of 57.00, it merits a designation of "Unsatisfactory" from TCEQ for purposes of evaluating this permit amendment request. Kinder Morgan's permit essentially confesses that "[p]er a Disclosure of Violation submitted to the TCEQ under the Audit Privilege Act, in order to obtain immunity Kinder Morgan Petcoke is required to submit a TPDES permit amendment." While this self-disclosure would shield Kinder Morgan from liability for the reported violations, it does not shield Kinder Morgan from responsibility for its poor record of permit non-compliance. TCEQ must consider Kinder Morgan's poor compliance history when weighing the adequacy of the discharge limits and operating practices set out in its proposed permit amendment.

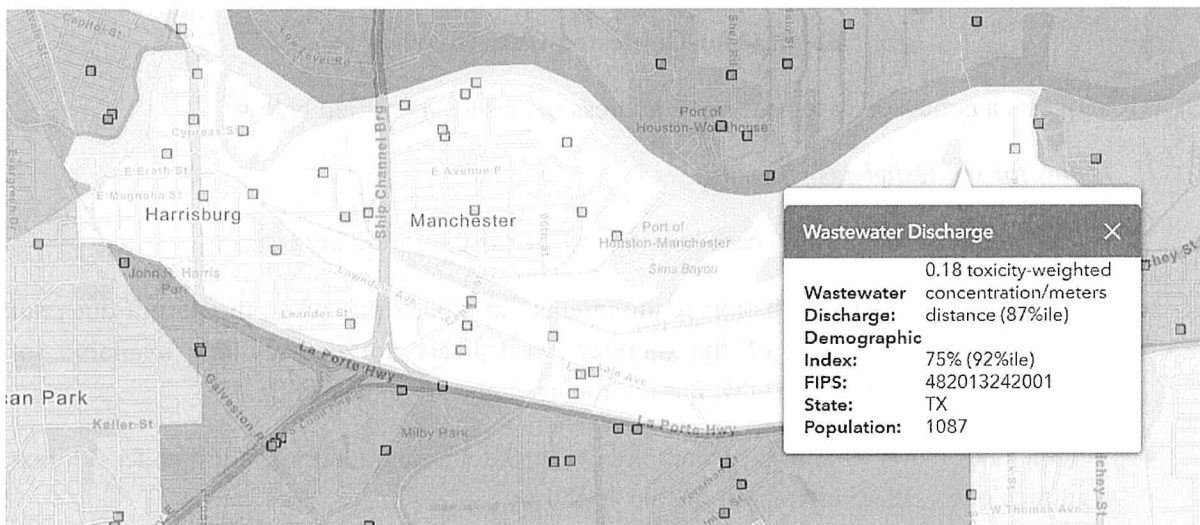
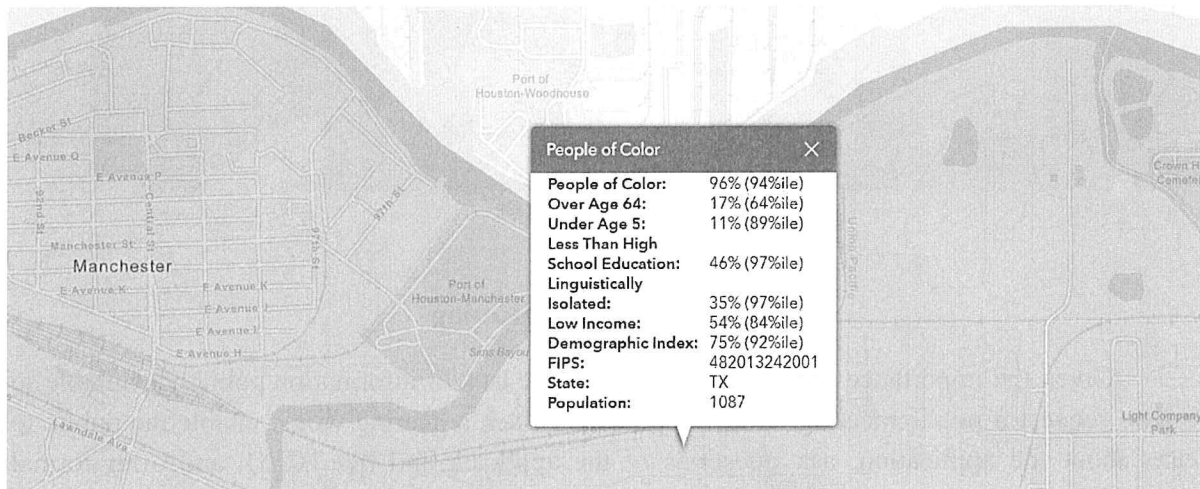
Our recommendation to update the applicant's compliance history rating to "Unsatisfactory" aligns with the Sunset Advisory Commission staff recommendation regarding the use of compliance history. The May 2022 publication of the staff report on the TCEQ included recommendation 2.1, "Require TCEQ's compliance history rating formula to consider all evidence of noncompliance while decreasing the current emphasis on site complexity, and direct the agency to regularly update compliance history ratings." We agree with this recommendation and believe that, if it were followed, the applicant would currently have an unsatisfactory rating.

4. Kinder Morgan does not address the serious environmental justice concerns present in their permit amendment

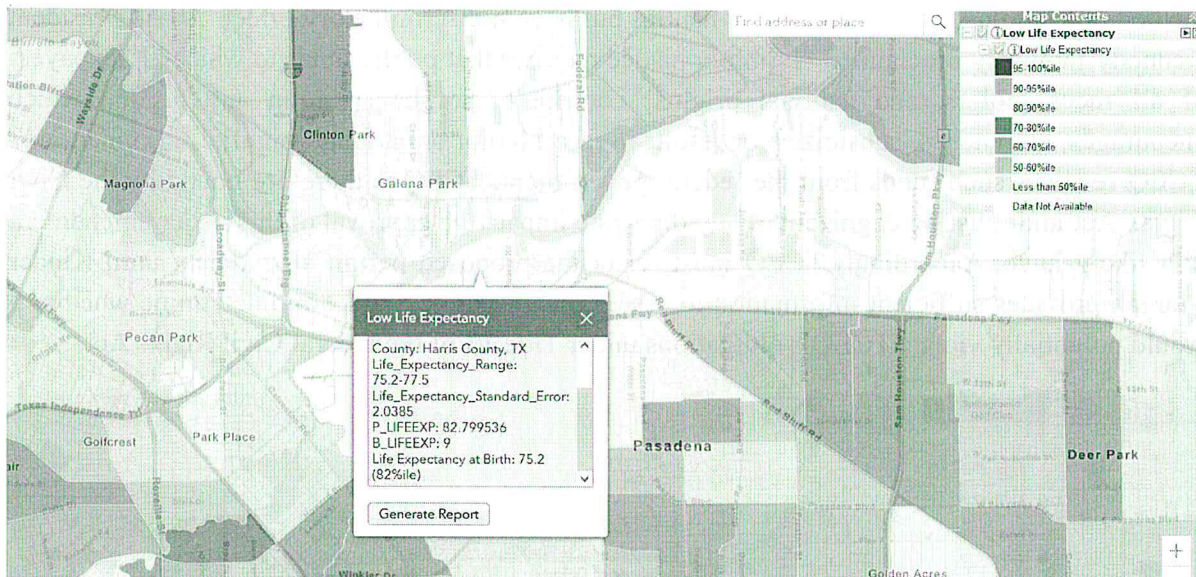
Kinder Morgan's permit amendment will affect a waterbody in a manner that will disproportionately harm a protected community. The area near the Kinder Morgan facility is composed of a population that is 96% people of color, 54% low-income, 46% with less than a high school education, and 35% linguistically isolated. EPA's EJScreen Tool lists the area as being in the top 94% of the national percentile for weighted wastewater toxicity. (*See images on page 5-6.*) Unsurprisingly the local population has a lower life expectancy than many of the surrounding areas. (*See United States Environmental Protection Agency. 2017 version. EJScreen. Retrieved: April, 16, 2022, from url <https://ejscreen.epa.gov/mapper/>. See also image 2 on Page 6.*) Kinder Morgan's expansion will only further the disparities.

Title VI of the federal Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives Federal funds or other Federal financial assistance. 42 U.S.C. §§ 2000d– 2000d-7. This prohibition applies to criteria or

methods of administration that appear neutral but have a discriminatory effect. *Id.* As President Kennedy famously proclaimed “[s]imple justice requires that public funds to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial [color or national origin] discrimination.”¹ TCEQ receives such funds from the federal government. TCEQ is therefore bound by the Civil Rights Act and must be cognizant of any disparate impact the approval of this major amendment will likely have. Accordingly, TCEQ must reject the proposed permit amendment until Kinder Morgan provides sufficient information to assess this disparate impact and determine whether it would potentially violate TCEQ’s obligations under Title VI of the federal Civil Rights Act.



¹"Title VI of the Civil Rights Act of 1964 42 U.S.C. § 2000d Et Seq.." *The United States Department of Justice*, 26 June 2020, <https://www.justice.gov/crt/fcs/TitleVI-Overview>.



Request for Public Meeting

Given the importance of this application and the lack of information publicly available so far, we request a public meeting on this application. Such a hearing would enable the public to learn about the application, ask questions of the applicant and the TCEQ, and offer formal comments.

Request for Contested Case Hearing

BCWK requests a contested case hearing to address the issues identified below.²

1. *Issues for contested case hearing*

BCWK requests a contested case hearing to address the following issues:

- Whether the public participation requirements have been met when the permit does not include a SWPPP, many of the required worksheets are not publicly available for viewing, and the content of what is available is vague and nonspecific.
- Whether the major amendment complies with the antidegradation policy under 30 Tex. Admin. Code § 307.5 and/or applicable TMDLs.
- Whether the facility's history of noncompliance warrants the requested major amendment or requires additional permit amendments that are more protective of public safety, public health, and water quality.

² Public Citizen and HPCC reserve the right to request a contested case hearing.

- Whether the proposed permit amendments's disregard for environmental justice concerns and the effects that this major modification will have on a protected community eliminates the permit's ability to be modified.

2. *"Affected person" status*

BCWK is an "affected person" with a personal justiciable interest affected by the application. BCWK is a membership-based non-profit organization with a personal justiciable interest affected by the application. BCWK is a 501(c)(3) non-profit organization working at the intersection of conservation and environmental justice to improve water quality, preserve wetlands, and create resilience to flooding and climate change across the Lower Galveston Bay watershed encompassing the greater Houston region. To achieve these goals, BCWK advocates for regional and local compliance with the Clean Water Act, Texas Water Code, and the TPDES permitting program and works to prevent any actions which could negatively affect water quality and human health throughout the watershed. BCWK has previously submitted comments and sought a contested case hearing for other permit modifications with effects on both Sims Bayou and Berry Bayou.

BCWK's members live along or near Sims and Berry Bayous and are concerned about how this major permit amendment could affect their aesthetic, recreational, health and/or property interests. BCWK's members also use Sims Bayou, Berry Bayou, and other connected waters within the Lower Galveston Bay watershed, including the San Jacinto River Basin, and Galveston Bay, for fishing, bird-watching, and recreation. BCWK submits this comment letter because its members are concerned that the proposed major amendment will harm water quality in Sims Bayou, Berry Bayou, and connected waters like Galveston Bay, and also negatively affect ecological and public health and economic interests in the area.

By allowing this major amendment to move forward, TCEQ will affect BCWK's interests as a non-profit organization, including its financial interests. If the permit amendment is granted without any further modifications, BCWK will be forced to reallocate its limited resources to monitoring increased risks associated with Kinder Morgan's petcoke facility. Rejecting the major amendment, or including additional safeguards within the permit, will avoid at least some of these impacts to BCWK's interests.

BCWK has members who independently have standing for reasons falling within the scope of the organization's mission. The following member of BCWK would have standing to request a hearing: Lisa Gray, 5123 French Creek Drive, Houston, Texas. Ms. Gray is a member of BCWK. Ms. Gray's property line is at the center of Berry Bayou, and she lives along the tidal portion of Berry Bayou (segment 1007), which connects to the tidal portion of Sims Bayou. Tidal influences may cause Kinder Morgan's wastewater effluent to reach these portions of Berry and Sims Bayou.

From Ms. Gray's house, she can see Berry Bayou and enjoys views of the bayou and wildlife, including snowy egrets, night herons, and other waterbirds, red-shouldered hawks, red-eared sliders, and leatherback turtles, as well as lightning bugs. She is concerned that Kinder Morgan's proposed major amendment may affect her ability to enjoy the views of the bayou and wildlife from her property, especially how increased amounts of petcoke or other pollutants in process wastewater and/or other effluent might affect water quality in Berry Bayou and harm wildlife in the area. Ms. Gray also uses Sims Bayou for recreational purposes. She regularly walks along Sims Bayou between Park Place Boulevard and the Houston Botanic Garden, an area of Sims Bayou that is tidally influenced and close to the Kinder Morgan petcoke facility. Her enjoyment of her walks depends on the water quality of Sims Bayou and her ability to observe wildlife in the area. Ms. Gray has similar concerns as she does about Berry Bayou about how the facility's major amendment might affect water quality and wildlife and, thus, her aesthetic and recreational interests in Sims Bayou.

Further, if the major amendment is granted, she is concerned how it will affect her property interests. If the major amendment does not adequately account for potential harms from increased petcoke or other pollutants in process wastewater and/or other effluent, Ms. Gray is concerned that it will not be sufficiently protective of water quality in Berry Bayou and could create new sources of pollution, which will harm the local ecosystem and wildlife that make the views from her home so special. She is also concerned that she would not be able to find a similarly-priced house with a comparable view in Houston.

Ms. Gray's concerns and injuries are consistent with BCWK's mission and her interests as a member of BCWK--specifically, BCWK's commitment to water quality across the Houston region, including along Sims and Berry Bayous.

Request for Addition to Mailing List

Thank you for the opportunity to submit these comments. Please add us to the permanent mailing list for this file. Here is contact information for BCWK, Public Citizen, and HPCC for all further communications related to this permit:

Bayou City Waterkeeper Attn: Kristen Schlemmer 2010 N Loop W #103 Houston TX 77018 info@bayoucitywaterkeeper.org 512-619-1583	Public Citizen Attn: Adrian Shelley 309 E 11th Street, Suite 2 Austin, TX 78701 512 477-1155	The Healthy Port Communities Coalition c/o Public Citizen Attn: Stefania Tomaskovic, Ph.D. 309 E 11th Street, Suite 2 Austin, TX 78701 512 477-1155
---	--	--

Sincerely,

Bayou City Waterkeeper
Kristen Schlemmer, Legal Director/Waterkeeper
Ryan Cooper, Law Student
Madison Goldblum, Law Student
Anthony Mourad, Law Student

Joined by:
Public Citizen
The Healthy Port Communities Coalition