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## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

April 3, 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 KINDER MORGAN  
PETCOKE, L.P. FOR PERMIT NO. WQ0002659000  
TCEQ DOCKET NO. 2023-0387-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, appearing to read "Sheldon P. Wayne".

Sheldon P. Wayne, Attorney  
Assistant Public Interest Counsel

cc: Mailing List

**DOCKET NO. 2023-0387-IWD**

<b>APPLICATION BY</b>	<b>§</b>	<b>BEFORE THE</b>
<b>KINDER MORGAN</b>	<b>§</b>	
<b>PETCOKE, L.P.</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>FOR TPDES PERMIT</b>	<b>§</b>	
<b>NO. WQ0002659000</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>

**THE OFFICE OF PUBLIC INTEREST COUNSEL’S RESPONSE  
TO REQUEST 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 (“the Commission” or “TCEQ”) files this Response to Request for Hearing 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 from the group Bayou City Waterkeeper (“BCWK”). As discussed herein, OPIC respectfully recommends granting BCWK’s hearing request and referring this application for a 180-day hearing at the State Office of Administrative Hearings (“SOAH”) on Issue nos. 1–4 contained in Section III.B.

**B. Background of Facility**

Kinder Morgan Petcoke, L.P. (“Applicant” or “Kinder Morgan”) applied to TCEQ for a major amendment to Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0002659000 (the “draft permit”) to authorize the addition of process wastewater at Outfall 001. The draft permit authorizes process wastewater and stormwater associated with industrial activity on an intermittent and flow-variable basis via Outfall 001.

The Applicant operates the Sims Bayou Petcoke Facility (the “Facility”), which is a petroleum coke railcar handling facility located at 9847 Lawndale Street, Houston, in Harris County. The treated wastewater is discharged via Outfall 001 directly to Sims Bayou Tidal in Segment No. 1007 of the San Jacinto River Basin. The designated uses for Segment No. 1007 are navigation and industrial water supply.

### **C. Procedural Background**

TCEQ received the application on November 3, 2021. On January 14, 2022, the Executive Director (“ED”) declared the application administratively complete. The Notice of Receipt and Intent to Obtain a Water Quality Permit was published on February 9, 2022 in the *Houston Chronicle*. The ED completed the technical review of the application on April 14, 2022 and prepared the draft permit, which if approved, will amend the conditions under which the Facility operates. The Notice of Application and Preliminary Decision was published on August 10, 2022 in the *Houston Chronicle*. The public comment period ended on September 9, 2022. The Chief Clerk mailed the ED’s Decision and Response to Public Comment on January 5, 2023. The deadline for filing requests for a contested case hearing and requests for reconsideration of the ED’s decision was February 6, 2023.

The Commission received one request for a contested case hearing from BCWK.

## **II. APPLICABLE LAW**

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).

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 30 TAC § 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 30 TAC § 55.201.

### **III. ANALYSIS OF HEARING REQUEST**

#### **A. Determination of Affected Person Status**

BCWK submitted a timely comment and hearing request on August 12, 2022. The request raises issues about the application's completeness and its effect on public participation; water quality concerns, including those related to antidegradation requirements; the Applicant's compliance history; and environmental justice. These interests include interests that are protected by the law under which this application will be considered.

BCWK states that it 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 Lower Galveston Bay watershed encompassing the greater Houston region.” Given its stated mission, OPIC finds that the interests BCWK seeks to protect are germane to its purpose. Additionally, OPIC finds that 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, a member

who would otherwise have standing to request a hearing in their own right, BCWK identifies member Lisa Gray, who resides at 5123 French Creek Drive, Houston.

The request explains that Ms. Gray lives along the tidal portion of Berry Bayou, which connects to the tidal portion of Sims Bayou. She currently enjoys recreational activities that she believes may be affected if the major amendment is granted. The request states that she views wildlife, both from her property and on her regular walks along Sims Bayou, and has concerns that the discharge will negatively impact water quality and area wildlife. According to the map created by the ED's staff, Ms. Gray's property is located approximately 2.5 miles from the Facility and outfall.

As stated above, a group or association must identify members with standing to request a hearing in their own right. Among other things, establishing standing requires that a reasonable relationship exists between the interest claimed and the regulated activity. OPIC finds that the intervening distance between Ms. Gray's residence and the regulated activity is too great to establish a reasonable relationship based on her property interests.

However, Ms. Gray also articulates her regular engagement in recreational activities that take place in close proximity to, and may reasonably be affected by, the discharge that would be authorized under the draft permit. She regularly walks along Sims Bayou, and a substantial component of her walks is her enjoyment of area wildlife. Because her activities could be impacted by the discharge authorized by the amendment, a reasonable relationship exists between the recreational interests she has identified and the Commission's regulation of the Facility. OPIC finds that these interests are sufficient to confer a finding of affectedness, and BCWK has therefore met all requirements 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 Application is complete and accurate;
2. Whether the Facility and draft permit will adversely impact water quality, in violation of applicable rules and statutes, including TCEQ's antidegradation policy and any applicable total maximum daily loads;
3. Whether the Applicant's compliance history rating was correctly calculated and considered by the Executive Director;
4. Whether the draft permit should be denied or modified based on the Applicant's compliance history; and
5. Whether the draft permit should be denied or modified based on environmental justice concerns of the surrounding community.

**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**

BCWK has raised issues that 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) as well as an issue that is not relevant and material. 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).

### Completeness of the Application

BCWK has stated that the application is incomplete and, as a result, it was unable to provide effective public comment. The group has specifically asserted that the application is missing a stormwater pollution prevention plan ("SWP3"), does not address best management practices or the expected volume of stormwater discharges, and does not include documentation showing work to support its conclusions. TCEQ rules require that if an applicant becomes aware that it did not submit required facts or submitted incorrect information in a permit application, the applicant is required to promptly submit the needed facts and information. 30 TAC § 305.125(19). Whether the Application adequately addresses stormwater, including whether it contains all required information, is a disputed question of fact. Therefore, Issue no. 1 is relevant and material to the Commission's decision regarding this application and is appropriate for referral to SOAH.

### Water Quality

BCWK is concerned that the proposed discharge may adversely impact water quality and does not comply with applicable rules and statutes, including TCEQ's antidegradation policy and total maximum daily load 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).

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 1 Antidegradation Review and preliminarily determined that existing water quality uses will not be impaired by this permit action. A Tier 2 review was not performed. Therefore, Issue no. 2 is relevant and material to the Commission’s decision regarding this application and appropriate for referral to SOAH.

#### Compliance History

BCWK is concerned that Applicant’s compliance history has not been properly evaluated by the ED. Pursuant to 30 TAC § 60.1(a)(1)(A), TCEQ is required to utilize an applicant’s compliance history when making decisions regarding an amendment of a permit. *Also see* TWC § 5.754(e). Further, the Commission is required to utilize compliance history for five years prior to the date the permit application is received by the ED, and specific components must be included in this history. 30 TAC § 60.1(b)–(c). Additional rules regarding use of compliance history in

making permitting decisions are found at 30 TAC § 60.3. Therefore, Issue nos. 3 and 4 are relevant and material to the Commission's decision regarding this application and appropriate for referral to SOAH.

### *Environmental Justice*

BCWK has stated a wide range of concerns implicating environmental justice. The TCEQ receives federal funding, and therefore, must comply with a suite of federal guidance and laws ensuring its actions are not intentionally discriminatory and will not have discriminatory effects.<sup>1</sup> For instance, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin.<sup>2</sup> Executive Order 12898 addresses the environmental and human health conditions of minority communities and low-income communities and calls on agencies to make achieving environmental justice part of their mission.<sup>3</sup> Executive Order 13166 requires federal agencies—and recipients of federal financial assistance—to examine the services they provide, identify any need for services to those with limited English proficiency, and develop and implement a system to provide those services so limited English proficiency persons can have meaningful access to them.<sup>4</sup>

TCEQ has made a commitment to preventing discriminatory actions or effects through its Title VI Compliance efforts, which are intended to ensure reasonable access to its decision-making processes. In furtherance of this, efforts have been made to develop and implement a Disability Nondiscrimination Plan, Public Participation Plan, and Language Access Plan. Together, these strategies are intended to provide equal access to Commission programs and activities.

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<sup>1</sup> See 40 CFR §7.35(b). <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-A/part-7>

<sup>2</sup> <https://www.justice.gov/crt/fcs/TitleVI>

<sup>3</sup> <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>

<sup>4</sup> <https://www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf>

However, the specific concerns raised by BCWK involving the location of the Facility in an area with minority and low-income populations and any disparate effects on that community are not currently addressed by concrete guidance or permitting rules. Without specific requirements relating to these concerns, they cannot be addressed in proceedings on this application. Therefore, OPIC cannot recommend referral of Issue no. 5 to SOAH.

#### **H. Issues Recommended for Referral**

For the reasons discussed above, OPIC recommends referring Issue nos. 1–4 in Section III.B to SOAH for a contested case hearing.

#### **I. Maximum Expected Duration of Hearing**

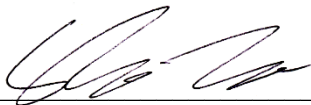
Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 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. CONCLUSION**

OPIC respectfully recommends that the Commission grant the hearing request of BCWK and refer Issue nos. 1–4 specified in Section III.B for a contested case hearing at SOAH with a maximum duration of 180 days.

Respectfully submitted,

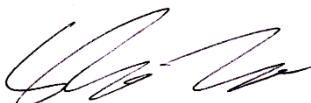
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**CERTIFICATE OF SERVICE**

I hereby certify that April 3, 2023, the original of the Office of Public Interest Counsel’s Response to Request for Hearing 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

**MAILING LIST**  
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**TCEQ DOCKET NO. 2023-0387-IWD**

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