

Jon Niermann, *Chairman*
Bobby Janecka, *Commissioner*
Catarina R. Gonzales, *Commissioner*
Kelly Keel, *Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

April 1, 2024

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 REMY JADE
GENERATING, LLC FOR TPDES PERMIT NO. WQ0005333000
TCEQ DOCKET NO. 2024-0490-IWD**

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Jennifer Jamison".

Jennifer A. Jamison, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2024-0490-IWD

**APPLICATION BY REMY JADE
GENERATING, LLC, FOR TPDES
PERMIT NO. WQ0005333000**

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**BEFORE THE
TEXAS COMMISSION ON
ENVIRONMENTAL
QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE
TO REQUESTS 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 (TCEQ) files this Response to Requests for Hearing and Request for Reconsideration in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by Remy Jade Generating, LLC for a major amendment without renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0005333000 which would change the discharge route. The Commission received timely comments and a request for a contested case hearing from David and Kathleen Howell, Linda and Steven Van Heeckeren, and attorney Clay Steely on behalf of Marjorie Dunn and John Kinzer. In addition, the Commission received a Request for Reconsideration from Clay Steely on behalf of Ms. Dunn and Mr. Kinzer. For the reasons stated herein, OPIC respectfully recommends the Commission find that all requestors are affected

persons in this matter and grant their pending hearing requests. In addition, OPIC respectfully recommends denial of the pending Request for Reconsideration.

B. Background of Facility

Remy Jade Generating LLC, (Remy Jade or Applicant) which proposes to operate Remy Jade Power Station, a natural gas-fired electric generating station, has applied to the TCEQ for a major amendment without renewal of TPDES Permit No. WQ0005333000. If issued, the draft permit would change the discharge route and authorize the discharge of water treatment wastes at a daily average flow not to exceed 162,000 gallons per day via Outfall 001.

The existing facility is located at 3511 Danek Road, in the City of Crosby, Harris County. The draft permit would authorize effluent to be discharged to an unnamed ditch, then to Harris County Flood Control District (HCFCD) ditch O119-00-00, then to HCFCD ditch O200-00-00, then to HCFCD ditch G103-03-00 (Bluff Gully), then to San Jacinto River Tidal in Segment No. 1001 of the San Jacinto River Basin. The unclassified receiving water uses are minimal aquatic life use for the unnamed ditch and limited aquatic life use for the HCFCD ditches. The designated uses for Segment No. 1001 are primary contact recreation and high aquatic life use.

C. Procedural Background

The TCEQ received the application on September 6, 2023, and declared it administratively complete on September 12, 2023. The Notice of Receipt of Application and Intent to Obtain a Water Quality Permit (NORI) was published in English and Spanish on September 21, 2023, in *The Baytown Sun* and *El Perico*,

respectively. The technical review was complete on October 24, 2023, and the Notice of Application and Preliminary Decision (NAPD) for a Water Quality Permit was issued on November 21, 2023. The NAPD was published in English on December 3, 2023, in *The Baytown Sun* and in Spanish on November 30, 2023, in *El Perico*. The public comment period ended on January 2, 2024. The Chief Clerk mailed the ED's Decision and Response to Comments (RTC) on February 13, 2024, and the deadline for filing requests for a contested case hearing and requests for reconsideration was March 14, 2024.

II. APPLICABLE LAW

A. Request for Hearing

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 requestor'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.

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.

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.

B. Request for Reconsideration

Any person may file a request for reconsideration of the ED's decision under 30 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.

III. DISCUSSION

A. Determination of Affected Person Status

David and Kathleen Howell

David and Kathleen Howell timely filed hearing requests on October 12, 2023 and November 6, 2023. In their requests, the Howells express concern about flooding, negative impacts to air quality, and effects on groundwater, as well as negative impacts to local wildlife, livestock, and household pets. Specifically, the requests state that the Howells are concerned that the discharge will directly impact cattle grazing pastures, migratory birds, and the local wildlife inhabitants who depend on these ditches to sustain life. Finally, the requests represent that the ditch where Applicant intends to discharge its wastewater is immediately adjacent to the community water well located in Requestors' neighborhood, Highland Ridge. The map prepared by staff for the ED shows that the Howells' property is located 0.42 miles from the Facility's outfall, and south of the discharge route.

While the Howells' concerns about flooding and air quality fall outside of TCEQ's jurisdiction for this permit, issues pertaining to negative impacts on water quality (including groundwater) and effects on animal life are relevant and material to the Commission's decision on this application. Given the relevance of the Howells' stated concerns and the proximity of their property to the outfall and discharge route, OPIC finds that David and Kathleen Howell have a personal justiciable interest in this application that is not common to members of the general public. Accordingly, OPIC recommends that the Commission find that the Howells are affected persons in this matter pursuant to 30 TAC § 55.203(a).

Linda and Steven Van Heeckeren

Linda and Steven Van Heeckeren timely filed combined comments and a hearing request on October 5, 2023. The Van Heeckerens express concern about flooding, lack of proper notice, effects on water quality (including groundwater), and negative impacts on animals, including local wildlife, grazing cattle, and pollinators. The map prepared by staff for the ED shows that the Van Heeckeren property is located 0.51 miles from the Facility's outfall, and south of the discharge route.

As previously stated, concerns about flooding fall outside of TCEQ's jurisdiction for this permit. In addition, the Van Heeckerens' concern regarding lack of proper notice refers to other potentially impacted neighbors not receiving proper notice, but not the Van Heeckerens themselves. Proper notice with respect to the Van Heeckerens is not disputed, as their request acknowledges receipt of notice addressed to adjacent landowners. Accordingly, OPIC cannot find that the

Van Heeckerens have a personal justiciable issue with respect to adequate notice or concerns about flooding. That said, the Van Heeckerens' remaining concerns pertaining to negative impacts on water quality (including groundwater) and effects on animal life are relevant and material to the Commission's decision on this application. Given the relevance of the Van Heeckerens' concerns about groundwater and animal life, and the proximity of their property to the outfall and discharge route, OPIC finds that Linda and Steven Van Heeckeren have a personal justiciable interest in this application that is not common to members of the general public. Accordingly, OPIC recommends that the Commission find that these Requestors are affected persons in this matter pursuant to 30 TAC § 55.203(a).

Marjorie Dunn and John Kinzer

Attorney Clay Steely submitted a timely combined comment and hearing request on behalf of landowners Marjorie Dunn and John Kinzer. The request expresses concern about potential environmental impacts to Ms. Dunn and Mr. Kinzer's land due to possible trespass of wastewater across their property. Specifically, the request states that the application provides no explanation for how any discharge will travel up gradient (uphill), away from my Ms. Dunn and Mr. Kinzer's property. Though the map prepared by ED staff states that the distance from the Dunn/Kinzer property to the facility outfall is 2.08 miles, the ED's adjacent landowners map and corresponding list shows that the point of discharge is directly adjacent to the Dunn/Kinzer property (and less than 1000 ft. from their property line).

Concerns about impacts to the environment resulting from the wastewater discharge are relevant and material to the Commission's decision on this application. Given the relevance of Ms. Dunn and Mr. Kinzer's concerns about effects on the environment, and the proximity of their property to the point of discharge and discharge route, OPIC finds that Marjorie Dunn and John Kinzer have a personal justiciable interest in this application that is not common to members of the general public. Accordingly, OPIC recommends that the Commission find that these Requestors are affected persons in this matter pursuant to 30 TAC § 55.203(a).

B. Issues Raised in the Hearing Requests of Affected Persons

Affected persons raised the following issues:

1. Whether the draft permit is adequately protective of water quality;
2. Whether the proposed discharge will adversely impact animal life, including fish, wildlife, domestic animals, and the environment;
3. Whether discharge from the proposed facility will increase the likelihood of flooding; and
4. Whether the draft permit is adequately protective of air quality.

C. Issues Raised in the Hearing Requests Remain Disputed

There is no agreement between the affected persons and the ED on the issues raised in the hearing requests. Accordingly, all issues remain disputed.

D. 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. All issues raised by Requestors are issues of fact.

E. Issues Were Raised by the Requestor During the Comment Period

Issues 1-4 in Section III. B were specifically raised by affected persons during the public comment period.

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

The hearing requests are based on timely comments that have not been withdrawn.

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

The hearing requests raise issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B) and 55.211(c)(2)(A)(ii). 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 the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Water Quality and Animal Life

Requestors raised concerns about adverse effects to water quality and the consequential impacts on terrestrial life, aquatic life, and the environment. The Commission is responsible for the protection of water quality under Texas Water Code Chapter 26 and 30 TAC Chapters 307 and 309. The Texas Surface Water Quality 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, “Water 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). Finally, 30 TAC § 307.4(e) requires that nutrients from permitted discharges or other controllable sources shall not cause excessive growth of aquatic vegetation which impairs an existing, designated, presumed, or attainable use. As Chapter 307 designates criteria for the regulation of water quality and the protection of animal life, Issues No. 1-2 are relevant and material to the Commission’s decision regarding this application and are appropriate for referral to SOAH.

Flooding and Air Quality

Requestors raised concerns regarding the proposed Facility’s impact on what is already a recurrent flooding problem in the area, due to the increased water volume caused by the proposed discharge. Likewise, Requestors expressed concern about the facility’s impact on air quality. TCEQ’s jurisdiction is established by statute and does not include authority under the Texas Water Code or its regulations to address or consider flooding or air quality when making a decision on issuance of this TPDES permit, unless there is an associated

water quality concern. Accordingly, Issues No. 3-4 are not relevant and material to the Commission's decision on this application.

H. Issues Recommended for Referral

For the reasons stated above, OPIC recommends referral of the following issues to SOAH:

1. Whether the draft permit is adequately protective of water quality; and
2. Whether the proposed discharge will adversely impact the environment and animal life, including fish, wildlife, and domestic animals.

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

Attorney Clay Steely submitted a timely request for reconsideration on behalf of landowners Marjorie Dunn and John Kinzer, asserting that the ED's Response to Comment offers no explanation for how the proposed wastewater discharge will travel upstream/uphill and not trespass and intrude on Ms. Dunn and Mr. Kinzer's land. While concerns regarding effects on the environment are relevant and material to the decision on this application, an evidentiary record would be necessary for OPIC to make a recommendation to the Commission as to whether the ED's decision should be reconsidered on these grounds. OPIC cannot recommend reconsideration or remand of the application without the benefit of such a record and must therefore recommend denial of Ms. Dunn and Mr. Kinzer's request for reconsideration.

V. CONCLUSION

Having found that David and Kathleen Howell, Linda and Steven Van Heeckeren, and Marjorie Dunn and John Kinzer qualify as an affected persons in this matter, OPIC respectfully recommends the Commission grant their hearing requests and refer Issue Nos. 1-2 specified in Section III. B. for a contested case hearing at SOAH with a maximum duration of 180 days. Finally, OPIC recommends denial of the Request for Reconsideration.

Respectfully submitted,

Garrett T. Arthur
Public Interest Counsel

By: *Jennifer Jamison*
Jennifer Jamison
Assistant Public Interest Counsel
State Bar No. 24108979
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-4104

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2024 the original of the Office of Public Interest Counsel's Response to Hearing Requests was filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via hand delivery, facsimile transmission, Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.

Jennifer Jamison
Jennifer Jamison

MAILING LIST
REMY JADE GENERATING, LLC
TCEQ DOCKET NO. 2024-0490-IWD

FOR THE APPLICANT

via electronic mail:

Stephanie Bergeron Perdue
Baker Botts LLP
401 South First Street, Suite 1300
Austin, Texas 78704
stephanie.bergeron.perdue@bakerbotts.com

Jennifer Coleman
Director of Regulatory Compliance
Remy Jade Generating, LLC
2001 Proenergy Boulevard
Sedalia, Missouri 65301
compliance@wattbridge.info

John Christiansen, P.E.
Program Manager - Industrial Water and
Wastewater
Tetra Tech
1500 CityWest Boulevard, Suite 1000
Houston, Texas 77042
john.christiansen@tetrattech.com

FOR THE EXECUTIVE DIRECTOR

via electronic mail:

Bekuechi Edeh, Staff Attorney
Texas Commission on Environmental
Quality
Environmental Law Division MC-173
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0600 Fax: 512/239-0606
bekuechi.edeh@tceq.texas.gov

Thomas Starr, Technical Staff
Texas Commission on Environmental
Quality
Water Quality Division MC-148
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4570 Fax: 512/239-4430
thomas.starr@tceq.texas.gov

Ryan Vise, Director
Texas Commission on Environmental
Quality
External Relations Division
Public Education Program MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678
pep@tceq.texas.gov

FOR ALTERNATIVE DISPUTE
RESOLUTION

via electronic mail:

Kyle Lucas, Attorney
Texas Commission on Environmental
Quality
Alternative Dispute Resolution MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-0687 Fax: 512/239-4015
kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK

via eFiling:

Docket Clerk
Texas Commission on Environmental
Quality
Office of Chief Clerk MC-105
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-3300 Fax: 512/239-3311
<https://www14.tceq.texas.gov/epic/eFiling/>

REQUESTER(S):

David & Kathleen Howell
10118 Braemar Street
Highlands, Texas 77562

Clay Steely
Porter Hedges
1000 Main Street, Suite 3600
Houston, Texas 77002

Linda Marie & Steven Van Heeckeren
2407 Barbers Hill Road
Highlands, Texas 77562