

TCEQ DOCKET NO. 2025-0080-IWD

**APPLICATION BY
DOW HYDROCARBONS &
RESOURCES LLC AND
UNION CARBIDE CORPORATION
FOR AMENDMENT WITHOUT
RENEWAL TO TPDES PERMIT
NO. WQ0000447000**

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**BEFORE THE TEXAS COMMISSION

ON

ENVIRONMENTAL QUALITY**

**DOW HYDROCARBONS & RESOURCES, LLC & UNION CARBIDE
CORPORATION’S RESPONSE TO REQUESTS FOR CONTESTED CASE HEARING
AND REQUEST FOR RECONSIDERATION**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

Dow Hydrocarbons & Resources, LLC, and Union Carbide Corporation (together, the “Applicant”) file this response to the requests for a contested case hearing and the request for reconsideration on its application (“Application”) for amendment without renewal to Texas Pollutant Discharge Elimination System (“TPDES”) Permit No. WQ0000447000 (the “Permit”) that authorizes discharges from the Applicant’s Seadrift Operations facility (the “Facility”). The Application reflects the Applicant’s significant improvements to the Facility’s ability to manage stormwater and filter and remove solids contained in stormwater generated at the Facility. To fully realize the benefits of these improvements, the Applicant has requested that its existing permit be modified to accurately reflect these improvements and other changes at the Facility.

The approval of the Permit is supported by the Applicant’s thorough Application and the Executive Director’s administrative and technical reviews of the Application. The Executive Director has rendered her final decision that the Application meets all statutory and regulatory

requirements and should, therefore, be approved by the Commission.¹ Despite the Executive Director’s findings in the preliminary decision and further described in the Executive Director’s Response to Comments (“RTC”), one association, San Antonio Bay Estuarine Waterkeeper (“SABEW”), and one individual, John Daniel, have requested a contested case hearing on the Application. (Mr. Daniel is also a member of SABEW). SABEW’s hearing request fails to identify any individual member who would have standing to participate in a contested case hearing in their own right. SABEW does not identify a member who lives or has a property interest near the Facility or along the proposed discharge route—SABEW’s members’ recreational interests in San Antonio Bay, Guadalupe Bay, and related waters are shared with the general public and occur far downstream from the Facility’s outfalls. As a result, SABEW has no personal justiciable interest in the Application and is not an “affected association.” Similarly, Mr. Daniel’s individual request fails to identify a personal justiciable interest in the Application, and he is not an “affected person.” Mr. Daniel does not live adjacent to the Facility or along the discharge route, and any interests expressed in his individual request are common to members of the general public. Because neither SABEW nor Mr. Daniel meet the requirements of standing, the Applicant respectfully requests that the Commissioners deny the requests for a contested case hearing.

SABEW has also requested that the Commission reconsider the Executive Director’s decision on the Application. Because SABEW’s request simply registers disagreement with the Executive Director’s decision on the Application and the Executive Director’s RTC, the Applicant respectfully requests that the Commissioners deny the request for reconsideration.

I. Introduction

The Applicant’s Facility is a chemical manufacturing facility located at 7501 State

¹ TCEQ, *Decision of the Executive Director on TPDES Permit No. WQ0000447000* (Nov. 19, 2024).

Highway 185 North, near the City of Seadrift in Calhoun County, Texas 77983. The Facility produces glycols, ethylene oxide derivatives, polyethylene and polypropylene. Operations also include a catalyst manufacturing facility that produces several catalysts. The rail assets at the site are owned and operated by Cosmos (Seadrift) SPV, LLC, 1 including the North and South Railyards and hopper car wash. In addition, Braskem America Inc. operates a polypropylene manufacturing facility at the site.

The Applicant made several significant improvements and modifications to the Facility both upstream and downstream of Outfall 002 that will enable it to manage stormwater more effectively and provide for increased filtration of solids from the wastewater streams prior to the discharge.² Importantly, these improvements have already resulted in considerable reductions of plastic pellets contained in the discharge channel downstream from the current Outfall 002 location. These improvements include a new stormwater surge basin, a silt basin, and a filtering and solids management system (“stormwater treatment system”).³ When the amended Permit is issued and Phase II is in effect, stormwater that had previously been discharged from the Outfall 006 drainage area will be rerouted to the Outfall 002 system to take advantage of these filtration and management improvements that provide treatment for more stormwater.⁴ Upon issuance of the amended Permit and the implementation of Phase II, the daily maximum flow would be increased at Outfall 002 from 17 million gallons per day (“MGD”) to 42 MGD. Some of this increased flow is from the drainage area previously discharged from the stormwater only Outfall 006. However, the increase in the daily maximum flow limit to 42 MGD will also account for stormwater currently discharged at Outfall 002 that is not recorded in the daily maximum “dry-

² See Union Carbide Corporation, Seadrift Operations Plant TPDES WQ0000447000 Amendment Application 2022, Attachment T-3, at 5–7 (Nov. 2022) (the “Application”).

³ *Id.*

⁴ *Id.*

weather flow” as authorized by the existing permit and Phase I of the amended Permit. In Phase II of the amended Permit, all stormwater previously discharged to Outfalls 002 and 006 will be managed in the new stormwater treatment system and discharged pursuant to a daily maximum flow limit of 42 MGD. The rerouting of stormwater from Outfall 006 to Outfall 002 allows the stormwater treatment system to effectively manage much more stormwater and provide for filtration to remove any remaining solids prior to its discharge.

Phase II of the amended Permit would also authorize an increase in the daily average flow at Outfall 002 from 12 MGD to 17 MGD. This increase in daily average flow reflects two changes. One change is that Phase II of the amended Permit will allow the discharge of cooling water blowdown at more frequent intervals, resulting in improved management of cooling water quality. The second change reflected in the authorized increase in daily average flow at Outfall 002 during Phase II relates to the addition of wet weather flow to the calculation of average flow, as discussed above. The existing permit and Phase I of the amended Permit only regulate dry-weather flow. Phase II of the amended Permit regulates all flow at Outfall 002—previously regulated dry-weather flow and wet weather flow. The increase in the daily average flow calculation merely recognizes the effect on the calculation of adding wet weather flow. Both of the changes are intended to improve the quality of the water discharged to the Victoria Barge Canal.

Other changes to the permit include:

- Authorization to route treated sanitary wastewater to the wastewater stabilization pond, which will only occur following the complete treatment and disinfection of the sanitary wastewater stream;
- Relocation of the flow measurement and monitoring point for Outfall 002; and
- Some changes in permit limits for specific constituents as explained by the TCEQ Executive Director in the Fact Sheet/Statement of Basis and the Executive Director’s RTC.

During Phase I of the Permit, discharges will continue to occur: via Outfalls 001, 002, 005, 006,

007, 008, 009, 010, and 012 directly to the Victoria Barge Canal Tidal in Segment No. 1701 of the Lavaca-Guadalupe Coastal Basin; via Outfall 003 to a ditch, to West Coloma Creek, then to Coloma Creek; via Outfalls 014 and 015 to West Coloma Creek, then to Coloma Creek; via Outfall 016 to West Coloma Creek Latera No, 17, to West Coloma Creek, then to Matagorda Bay/Powderhorn Lake in Segment No. 2451 of the Bays and Estuaries; and via Outfall 004 to an unnamed ditch, then to San Antonio Bay/Hynes Bay/Guadalupe Bay/Mission Lake in Segment No. 2462 of the Bays and Estuaries. During Phase II of the Permit, the only change in discharge routes will be that stormwater previously discharged at Outfall 006 will be discharged at Outfall 002.

II. Procedural Background

The Applicant filed the Application for Permit No. WQ0000447000 on December 27, 2022, and the Executive Director of the TCEQ declared the Application administratively complete on March 31, 2023. The Notice of Receipt of Application and Intent to Obtain Water Quality Permit (“NORI”) was published in English on March 29, 2023, in the *Port Lavaca Wave I* and in Spanish in the *Revista de Victoria* on April 5, 2023. A Combined Notice of Public Meeting, NORI, and Notice of Application and Preliminary Decision (“CO-NORI-NAPD”) was published on April 10, 2024, in English in the *Port Lavaca Wave* and on March 28, 2024, in Spanish in the *Revista de Victoria*. The Application was declared technically complete on November 14, 2023. A CO-NORI-NAPD was published on June 26, 2024, in English in the *Port Lavaca Wave* and on June 28, 2024, in Spanish in the *Revista de Victoria*. The CO-NORI-NAPDs contained clear and specific instructions for public participation, including how to request a contested case hearing on the Application.

The Executive Director evaluated the comments filed on the Application and draft Permit

and filed its RTC with the TCEQ Chief Clerk on November 12, 2024. The Chief Clerk issued a letter dated November 19, 2024, transmitting the RTC and alerting the public of the Executive Director’s decision that the Application meets the requirements of applicable law for permit issuance. The Executive Director’s RTC addressed the relevant and material concerns identified in the timely comments filed on the Application, including the comments filed by the associations and individuals that have filed requests for contested case hearings or reconsideration of the Executive Director’s decision.

On January 31, 2025, the Chief Clerk issued a letter stating that the Commissioners will consider the contested case hearing requests on March 13, 2025. The Applicant hereby provides its response to the contested case hearing requests and requests for reconsideration in accordance with Commission rules and the agenda setting letter.

III. Legal Standards for Review of Requests for Contested Case Hearing

Texas law and TCEQ rules identify the legal standard for participation in a contested case hearing and the required elements of a valid contested case hearing request. To be granted a contested case hearing, the request must be made by an “affected person,”⁵ it must “request a contested case hearing,”⁶ and the request must be timely.⁷ Each of these three prongs is a mandatory requirement, and the request must fail if there is a failure to meet any one of them.

A. The Request Must Be Made by an Affected Person.

1. Affected Persons

The Texas Water Code allows only affected persons to participate in a contested case

⁵ 30 TEX. ADMIN. CODE § 55.201(b)(4).

⁶ 30 TEX. ADMIN. CODE § 55.201(d)(3).

⁷ 30 TEX. ADMIN. CODE § 55.211(c)(2)(B). To be timely, a request for contested case hearing must be filed no later than 30 days after the TCEQ Chief Clerk mails (or otherwise transmits) the Executive Director’s decision and response to comments on an application and draft permit. *See* 30 TEX. ADMIN. CODE § 55.201(a).

hearing on water quality permit applications.⁸ The Texas Legislature has defined the universe of affected persons who may validly demand that a contested case hearing be held by or on behalf of the Commission. Only those persons who have “a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing” may be granted a hearing.⁹ “An interest common to members of the general public does not qualify as a personal justiciable interest.”¹⁰

TCEQ rules specify the factors that must be considered in determining whether a person is an affected person. Those factors are:

- (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.¹¹

Consistent with the Senate Bill 709 changes to the Texas Water Code adopted in 2015, the Commission may consider additional factors in determining whether a person is an affected

⁸ See TEX. WATER CODE § 5.556; 5.115.

⁹ TEX. WATER CODE § 5.115(a); *see also* 30 TEX. ADMIN. CODE § 55.203(a).

¹⁰ *Id.*

¹¹ 30 TEX. ADMIN. CODE § 55.203(c).

person, including:

- (1) the merits of the underlying application and supporting documentation in the commission's 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.¹²

In considering evidence to apply the above factors to a given request, the Third Court of Appeals has explained that TCEQ “enjoys the discretion to weigh and resolve matters that may go to the merits of the underlying application, including the likely impact the regulated activity ... will have on the health, safety, and use of property by the hearing requestor and on the use of natural resources.”¹³ TCEQ’s application of the factors described above “may include reference to the permit application, attached expert reports, the analysis and opinions of professionals on its staff, and any reports, opinions, and data it has before it” and specifically may include modeling reports that assess the impact of the proposed emission or discharge.¹⁴ In making these determinations, the court was applying the Texas Supreme Court’s 2013 decision in *Texas Commission on Environmental Quality v. City of Waco*, which affirmed TCEQ’s discretion to rely on such information in making an affected person determination.¹⁵

2. Affected Group or Association

In certain limited circumstances, a group or association can qualify as an affected person. But a group or association will have standing to participate in a contested case hearing only if each of the following four requirements are met:

- (1) comments on the application are timely submitted by the group or association;

¹² TEX. WATER CODE § 5.115(a-1); 30 TEX. ADMIN. CODE § 55.203(d).

¹³ *Sierra Club v. Tex. Comm’n on Env’tl Quality*, 455 S.W.3d 214, 223 (Tex. App.—Austin 2014, pet. denied).

¹⁴ *See id.*

¹⁵ 413 S.W.3d 409 (2013).

- (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.¹⁶

A contested case hearing request filed by a group or association must identify an individual who is a member of the group or association who is an affected person for purposes of the application, and who has a personal justiciable interest in the application that is not an interest shared with members of the general public.

B. The Request Must Be Filed Timely with the TCEQ.

TCEQ rules provide that a request for a contested case hearing must be filed no later than 30 days after the Chief Clerk mails (or otherwise transmits) the Executive Director's decision and RTC and provides instructions for requesting that the Commission reconsider the decision or hold a contested case hearing.¹⁷

TCEQ's rules do not provide a cure period or other opportunity to correct deficient hearing requests, whether the attempt to cure deficient requests consists of adding or referring to new members or adducing new facts to bolster claims of affected-person status for associations, their members, or individual requestors. TCEQ's rules require a specific deadline for submitting requests within 30 days after the Executive Director's decision and issuance of the Response to Comments.¹⁸ A contested case hearing request must meet this deadline and must identify the requestor's (or member's) name and their "personal justiciable interest affected by the

¹⁶ 30 TEX. ADMIN. CODE § 55.205(b).

¹⁷ 30 TEX. ADMIN. CODE § 55.201(a)&(c).

¹⁸ 30 TEX. ADMIN. CODE § 55.201(a).

application.”¹⁹ The deadline to submit requests for a contested case hearing passed on December 19, 2024. TCEQ’s rules on the schedule for submitting responses to hearing requests depend on the request itself—including any descriptions of the bases for affected-person status or statements about personal justiciable interests—being complete.²⁰ The rights of the Applicant, the Executive Director, and the Office of Public Interest Counsel to file responses to contested case hearing requests will be impaired by any attempt to bolster or supplement the affected-person status claims with new information via a reply and any such attempts should be treated as an untimely filed contested case hearing request.

This response, insofar as it relates to the affected-person status of SABEW’s members, only addresses those identified in SABEW’s request: Diane Wilson, Mauricio Blanco, Curtis Miller, and John Daniel.

C. The Required Elements of a Request for Contested Case Hearing

TCEQ rules at 30 TEX. ADMIN. CODE § 55.201(d) identify the requirements for a request for a contested case hearing:

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. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- (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;

¹⁹ 30 TEX. ADMIN. CODE § 55.201(d)(2).

²⁰ See 30 TEX. ADMIN. CODE § 55.209.

- (3) request a contested case hearing;
- (4) for applications filed: ...

(B) on or after September 1, 2015, 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 executive director'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.²¹

TCEQ rules regarding the scope of contested case hearings also provide that the Commission may not refer an issue to SOAH for a contested case hearing unless the Commission determines that the issue:

- (1) involves a disputed question of fact or a mixed question of law and fact;
- (2) was raised during the public comment period, and, for applications filed on or after September 1, 2015, was raised in a comment made by an affected person whose request is granted; and
- (3) is relevant and material to the decision on the application.²²

IV. Application of the Legal Standards to the Requests for Contested Case Hearing

One association, SABEW, and one individual, John Daniel, filed requests for a hearing on the Application. Applying the principles described above, in order to establish affected-person status entitled to a contested case hearing with regard to the Application, SABEW and Mr. Daniel must show that (1) issuance of the Permit as proposed would cause one or more of its members to suffer an injury (*i.e.*, a concrete and particularized invasion of a legally protected interest, *not common to the general public*, that is actual or imminent as opposed to conjectural or hypothetical), (2) the alleged injury is “fairly traceable” to the issuance of the Permit as proposed, and (3) that

²¹ 30 TEX. ADMIN. CODE § 55.201(d).

²² 30 TEX. ADMIN. CODE § 50.115(c).

the injury would likely be redressed by a favorable decision on the party's complaints regarding the proposed permit (*i.e.*, the Commission's refusal to grant the permit or imposition of additional conditions).²³ As noted in *City of Waco*, a requestor must show that "potential harm" is "more than speculative. There must be some allegation or evidence that would tend to show that the [requestor's legally protected interests] will be affected by the action."²⁴ And in *City of Waco* the Texas Supreme Court also affirmed that requestor claims about injury or harm are to be evaluated in the context of the specific application; when an amended permit is to be more protective of water quality than the existing permit, the TCEQ may consider those benefits in determining whether a requestor is an affected person.²⁵

No individual identified in any hearing request identifies any injury that is "fairly traceable" to the Application or the amended Permit recommended for approval by the Executive Director. As a result, neither any SABEW member nor Mr. Daniel has a personal justiciable interest in the Application, and they fail to qualify as affected persons or affected groups or associations. Further, the interests of the individuals identified in the hearing requests are common to members of the general public. No requestor has shown that "potential harm" would result from issuing the amended Permit as proposed.

The following facts are instructive in the evaluation of the individual and association hearing requests filed on the Application to amend the Permit without renewal. In reviewing the

²³ *Tex. Comm'n on Envt'l Quality v. City of Waco*, 413 S.W.3d 409, 423 (Tex. 2013).

²⁴ *Id.* at 805-06 (quoting *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 883 (Tex. App.—Austin 2010, pet. denied)); *see also United Copper v. Grissom*, 17 S.W.3d 797, 803-04 (Tex. App.—Austin 2000, pet. dismissed) ("potential harm" that conferred standing was established by United Copper's own data indicating that its operations would increase levels of lead and copper particulate at Grissom's home and his child's school, together with proof that Grissom and his child suffered from "serious asthma"); *Heat Energy Advanced Tech., Inc. v. West Dallas Coal. for Envt'l Justice*, 962 S.W.2d 288, 295 (Tex. App.—Austin 1998, pet. denied) ("potential harm" established where association member's house was located one-and-a-half blocks from facility, permit applicant had acknowledged in another Commission proceeding that facility emitted odors, and association member claimed to detect strong odors coming from it).

²⁵ *City of Waco*, 413 S.W.3d at 418 (rejecting the appellate court's conclusion that the protectiveness of a permit is "irrelevant" to the Commission's determination of affected-person status).

facts, it is helpful to recall that in this proceeding the only significant changes in the discharge authorizations are increases in flows at Outfall 002 during Phase II of the Permit:

- Neither any SABEW member nor Mr. Daniel claims to live or own property along the entire distance of the Victoria Barge Canal, including from Outfall 001 and 002 to the entrance of the Victoria Barge Canal from Guadalupe Bay.
- Neither any SABEW member nor Mr. Daniel claims to have recreational interests in the Victoria Barge Canal, including the approximately 4.9 miles from the Facility's outfalls to the entrance of the canal.²⁶
- Some SABEW members claim recreational interests in San Antonio Bay, Guadalupe Bay, or Mission Lake.
- The distance from Outfalls 001/002 to the entrance of the Victoria Barge Canal, is about 4.9 miles.
- San Antonio Bay is further downstream from Guadalupe Bay, the Victoria Barge Canal, and Outfalls 001 and 002.
- The San Antonio and Guadalupe Bays, Victoria Barge Canal, and Mission Lake are used regularly by the general public for the same recreational uses (fishing and hunting) as those engaged in by the requestors.
- Everyone that uses the waters for recreation would be affected in the same way the requestors are affected.
- The effluent limits are based on water quality standards designed to protect aquatic life, recreation, and human health.
- If issued, the Permit will adequately maintain and support the recreational and aquatic life uses of the receiving waters.

A. No Individual is an Affected Person Because of the Proximity of Their Places of Residence to the Point of Discharge.

The TCEQ reasonably evaluates the distance between a requestor and the activity to be authorized in determining whether an individual or association that filed a request for a contested case hearing may be affected in a manner uncommon to the general public. Texas courts have approved of this practice—for example, the Third Court of Appeals has upheld past Commission determinations that a requestor is not an affected person based on Commission determinations that

²⁶ See Aff. of Lial Tischler, ¶¶ 4-5.

the requestors resided more than 3 miles²⁷ and 1.3 miles²⁸ away from proposed facilities seeking authorization under the waste program.

Based on their respective addresses, three of SABEW's members live a considerable distance from the Facility and the relevant discharge points: Ms. Diane Wilson is nearly eleven miles away; Mr. Mauricio Blanco is nine miles away; and Mr. Curtis Miller is *twenty-nine* miles away. Even by a generous estimate, the closest member to the Facility lives three times further away, and more than nine times further away, than the requestors in *Sierra Club* and *Collins*, each of whom was denied affected person status.²⁹

The individual requestor, Mr. John Daniel, who is also a member of SABEW, attests that he lives approximately 1.3 miles from the nearest perimeter of the Facility. However, Mr. Daniel's properties are not adjacent to the Facility or the receiving waters, and his home is approximately 4 miles across land from the Outfalls 001/002. Mr. Daniel provides no basis for concluding that the surface water discharge from the Facility will reach, let alone affect, his properties. Like the requestor in *Collins*, whose property was not adjacent to the proposed property and whose home was approximately 1.3 miles away from the proposed lagoons at issue in that case, Mr. Daniel does not satisfy TCEQ's definition of an "affected person."³⁰

Specific to the TPDES program, the TCEQ's application provides clear guidance on the proximity of persons who may claim they are likely to be affected by the Application. The application instructions require that an applicant identify and mail notice to those persons who own property that adjoins the facility or is within one mile downstream of the discharge point on non-tidal waters or ½ mile of the discharge point if the discharge is to a tidally influenced water

²⁷ *Sierra Club*, 455 S.W.3d at 224.

²⁸ *Collins v. Tex. Nat. Res. Conservation Comm'n*, 94 S.W.3d 876, 883 (Tex. App.—Austin 2002).

²⁹ *Sierra Club*, 455 S.W.3d at 224; *Collins*, 94 S.W.3d at 883.

³⁰ *Collins*, 94 S.W.3d at 883.

body.³¹ Given that no requestor has any property interest along the discharge routes from the Facility, none of the requestors will be affected by issuance of the Permit, and certainly not in a manner that is uncommon to the general public.

³¹ TCEQ, Instructions for Completing the Industrial Wastewater Permit Application at 34 (Form 10411-10055inst), available at <https://www.tceq.texas.gov/downloads/permitting/wastewater/forms-tools/10411-10055inst.docx>.

B. The Claimed Recreational and Other Non-Property Interests are Not Sufficient to Establish Affected-Person Status.

The members of SABEW and Mr. Daniel claim recreational and other interests in the San Antonio and Guadalupe Bays, along the Victoria Barge Canal, and in Mission Lake. Their stated interests are not sufficient to make the requestors affected persons. Under Texas law governing standing, an injury cannot simply be speculative, but instead must be “concrete, particularized, actual, or imminent.”³² When read in context, the Texas Attorney General’s statement, as recently as 2020, provides that TCEQ’s “affected person” definition embodies constitutional principles of Article III standing.³³ Thus, a contested case hearing requestor must establish, at a minimum, a concrete and particularized injury-in-fact, *not common to the general public*, that is: (1) actual or imminent; (2) fairly traceable to the issuance of the permit as proposed; and (3) likely to be redressed by a favorable decision.³⁴

When the claimed interest is based on recreational interests, Texas law makes clear that standing is not conferred without an interest in property that is affected by the challenged action—to distinguish the claimed injury from that experienced by the general public.³⁵ The Third Court of Appeals has stated:

There is no Texas authority for the proposition that ... injury to a member’s environmental, scientific, and recreational interests generally and without any interest in or connection to the real property involved—is the type of interference with a legally protected interest or injury that confers standing as a matter of state law.³⁶

³² *Tex. Disposal Sys. Landfill v. Tex. Comm’n on Env’tl Quality*, 259 S.W.3d 361, 363 (Tex. App.—Amarillo 2008 (citing *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-305 (Tex. 2008)).

³³ Statement of Legal Authority to Regulate Oil and Gas Discharges under the Texas Pollutant Discharge Elimination System Program, Texas Attorney General Ken Paxton, at 12 (Sept. 18, 2020).

³⁴ *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992)).

³⁵ *Save Our Springs Alliance*, 304 S.W. 3d at 880.

³⁶ *Id.* at 882.

The Commission has previously found that recreational activities on public waters miles downstream from a permitted discharge are not a valid basis for affected person status. In *Application of Southwestern Electric Power Company for Renewal and Major Amendment of TPDES Permit No. WQ0002496000*, the TCEQ denied two associations’ hearing requests—as recommended by the State Office of Administrative Hearings (“SOAH”)—because the associations had not demonstrated standing as affected associations.³⁷ The associations had identified two members on which they based their party-status claims, and the closest of the two engaged in occasional recreational activity in a location on a river that was approximately four miles south of the facility (a power plant) that held the TPDES permit at issue.³⁸ The Commission’s Order included findings that members of the general public used the river for the same recreational uses as those individuals on whom the hearing request was based.³⁹ The Commission determined that their recreational uses of the river were “common to members of the general public,” and found that they were not affected persons—and that the associations in which they were members were not affected associations.⁴⁰

As discussed in further detail below, consistent with the Commission and applicable Texas case law precedent, none of the hearing requests meet the requirements for standing to participate in a contested case hearing on the Application based on recreational or other interests. Therefore, the Commission should deny the requests for a contested case hearing.

1. SABEW’s Members

SABEW’s hearing request identifies four individual members of the group or association:

³⁷ Order, *Application by Southwestern Electric Power Company for Renewal and Amendment to TPDES Permit No. WQ0002946000*, TCEQ Docket No. 2011-2199-IWD (2012); Proposal for Decision, *Application by Southwestern Electric Power Company for Renewal and Amendment to TPDES Permit No. WQ0002946000*, SOAH Docket No. 582-12-5301; TCEQ Docket No. 2011-2199-IWD (2012).

³⁸ *Id.*; Commission Order at Finding of Fact No. 21.

³⁹ *Id.*; Commission Order at Finding of Fact Nos. 39-45.

⁴⁰ *Id.*; Commission Order at Finding of Fact No. 45; Conclusion of Law No. 1.

Diane Wilson, Mauricio Blanco, Curtis Miller, and John Daniel. SABEW has failed to demonstrate that it meets the requirements for association standing because no SABEW member identified in the hearing request qualifies as an affected person in their own capacity. Thus, SABEW lacks affected person status as an association and its contested case hearing request should be denied.

Member #1 – Diane Wilson. Ms. Wilson claims to regularly visit San Antonio and Guadalupe Bays to fish, catch shrimp, and observe endangered whooping crane flights. Outfalls 001/002 discharge to the Victoria Barge Canal, the entrance of which to Guadalupe Bay is approximately 4.9 miles from the Outfalls. The San Antonio Bay is several miles on the other side of Guadalupe Bay from the Outfalls.⁴¹ Ms. Wilson's uses of these waters for these activities are common to members of the general public. Ms. Wilson further describes a monthly kayak or skiff trip along the Victoria Barge Canal, where she looks for evidence of plastic pellets or plastic debris in the canal or along the shoreline. Ms. Wilson describes no other reason for these monthly visits other than to observe evidence of discharged plastic pellets or debris; this is not recreational activity, but rather investigative work in furtherance of potential claims against industrial facilities in the area.

Ms. Wilson also describes how she and other fishers and shrimpers have used the Victoria Barge Canal to protect boats from hurricanes. To the extent she would do so again, nothing in the Permit would prevent her from storing her boats in the canal. Ms. Wilson also expresses concern third parties have been unable to participate in the Permit process, but that is not a particularized, concrete injury to Ms. Wilson.

⁴¹ See Aff. of Lial Tischler, Attachment 1.

Member #2 – Mauricio Blanco. Mr. Blanco lives at 714 South San Antonio Street in Port Lavaca, which is not along the discharge route from the outfalls at the Facility to San Antonio Bay. Mr. Blanco claims to fish and shrimp in the San Antonio, Matagorda, and Lavaca Bays, and expresses general concerns about the economic productivity of the Bays and his community's enjoyment of the Bays. Mr. Blanco expresses concern that discharges from the Facility could adversely affect shrimp populations in the Bays, especially San Antonio Bay. Still, these concerns are both speculative as to the cause of his claimed observance of dead shrimp and common to other shrimpers and fishermen in the area. Mr. Blanco's concerns also have no relationship to the specific amendments request by the Application and to be considered by the Commission. These concerns do not create a personal justiciable interest uncommon to members of the general public.

Member #3 – Curtis Miller. Mr. Miller owns and operates a seafood business, Miller Seafood Company, Inc., which sells shrimp and oysters harvested in the San Antonio, Lavaca, and Matagorda Bays. The location given for Mr. Miller's address is 905 South Pine Street, which is a Miller's Seafood Company location about 29 miles from the Facility. Mr. Miller expresses concern about the generalized decline in seafood populations, but these concerns are unsubstantiated and not quantified. Mr. Miller's recreational and commercial uses of the waters upstream and downstream from the Facility do not create a personal justiciable interest and are common to members of the general public.

Member #4 – John Daniel. Mr. Daniel lives at 1714 FM 2235 in Port Lavaca; Mr. Daniel also owns a farming and ranching property located at 1462 FM 2235, adjacent to and immediately northeast of the 1714 FM 2235 address. Mr. Daniel expresses concern

about his proximity to the Facility and the impact on his cattle operation/productive land use, but these concerns are too speculative and not connected to the Facility's actions that are the subject of this proceeding. None of the surface water discharges from the Facility will reach either of Mr. Daniel's two properties. The surface water discharges from the Facility will not affect Mr. Daniel's wells located on his properties, and neither Mr. Daniel nor SABEW describe how such discharges *could* affect the wells. Mr. Daniel expresses a concern that the Facility's discharges will degrade the natural resources and public land around the Facility, where he likes to recreationally hunt, fish, and observe wildlife in San Antonio Bay, its marshes, Guadalupe Bay, and Mission Lake. However, Mr. Daniel only speculates that the Facility's discharges, which may eventually reach these water bodies, will result in changes to gamebird migrations or other wildlife behavior that would be "fairly traceable" to the contents of this Application. Mr. Daniel also expresses concern about a proposed small modular nuclear reactor to be built at the Facility, but that proposed development is not regulated by TCEQ under the TPDES program, is not related to the Application itself, and does not present an actual or imminent injury under *Lujan*. Thus, Mr. Daniel's concerns and activities do not create a personal justiciable interest in the Application itself and are common to members of the general public.

The requestors' recreational interests in the San Antonio and Guadalupe Bays, the Victoria Barge Canal, and Mission Lake are not more particularized than those common to the members of the general public. Thus, their recreational interests fail to make them affected persons based on the plain language of the Texas Water Code, TCEQ's rules, and applicable case law.

SABEW's members make generalized claims about degraded water quality or the presence of plastics in San Antonio and Guadalupe Bays, the Victoria Barge Canal, and Mission Lake, and

offer only conclusory statements attributing observed water quality issues or plastics to the operations of the Facility. Ms. Wilson, for example, jumps to the conclusion that pellets observed in the Victoria Barge Canal, even those seven miles upstream of Outfalls 001 and 002 that are presumably carried upstream by “tidal influences,” are traceable to the Facility’s discharges. Mr. Blanco and Mr. Miller suspect that there may be a connection between the discharges from the Facility and claimed observations of impacts on shrimp and oyster populations. But there are no citations in SABEW’s contested case hearing request to any studies that would link observed pellets or impacts to fish with discharges from the Facility. Further, SABEW does not attempt to distinguish discharges from the Facility from those multiple industrial facilities that discharge into the Victoria Barge Canal and other nearby waters. Nearly all of the SABEW members’ claimed recreational or economic injuries with respect to water quality issues in the Victoria Barge Canal, Guadalupe Bay, San Antonio Bay, and Mission Lake *predate* the Application and therefore do not specifically trace alleged harms to TCEQ’s issuance of more protective amended Permit.⁴² The evidence about adverse effects on economic, recreational, and property interests is too speculative, conjectural, or hypothetical to be credible or material. The requestors’ claims fall far short of the requirement in *Lujan* to offer a “fairly traceable” causal link between a claimed injury and the action being considered by the Commission and its staff. The conclusion that the requestors are not affected persons on the basis of their recreational interests is further supported by decisions of several Texas courts that have considered whether recreational uses shared with other members of the general public can form the basis to establish that an individual has a personal justiciable interest. For example, in *Application of Southwestern Electric Power Company for Renewal and*

⁴² See *City of Waco*, 413 S.W.3d at 418 (affirming the TCEQ’s denial of a contested case hearing request where the Executive Director had concluded, among other things, that taste and odor problems had predated industrial development).

Major Amendment of Major Amendment of TPDES Permit No. WQ00024960001, the Commissioners denied a contested case hearing request because the requestors' claimed recreational interests (kayaking, canoeing, boating, fishing, hunting, camping, and swimming) were "indistinguishable from those common to the general public and fail to demonstrate a personal justiciable interest as require to establish affected person status."⁴³ Specifically, TCEQ found that two members did not qualify for party status. The first member, Richard LeTourneau, at his closest point to the power plant, "recreate[d] ... approximately 10 miles from the nearest outfall."⁴⁴ The second member, Thomas Rosborough, owned two pieces of property near the power plant: a river property Mr. Rosborough used for recreation which was "located approximately four miles south" of the power plant, and a ranch property "located a few miles west of the river property."⁴⁵ The waterbodies on which these members recreated were "used daily by the general public for the same recreational uses as those engaged in by [the members]" and thus were common to the general public.⁴⁶ Because SABEW's members' interests are substantially the same as those in the Southwestern Electric Power proceeding, their recreational interests are common to the general public and, thus, cannot be the basis for affected-person status.

As an additional, more recent example, SABEW's members' claims for affected-person status differ markedly the personal justiciable interests articulated by Richard Martin, considered by the Commission in its decision to refer Corix Utilities Texas, Inc.'s application for a major

⁴³ An Order Concerning the Application by Southwestern Electric Power Company for Renewal and Amendment to TPDES Permit No. WQ0002496000, TCEQ Docket No. 2011-2199-IWD, 2012 WL 6625131 (Dec. 10, 2012); Proposal for Decision, Application of Southwestern Electric Power Company for Renewal and Major Amendment of TPDES Permit No. WQ0002496000, TCEQ Docket No. 2011-2199-IWD, 2012 WL 3775912 at *9 (Aug. 21, 2012).

⁴⁴ An Order Concerning the Application by Southwestern Electric Power Company for Renewal and Amendment to TPDES Permit No. WQ0002496000, TCEQ Docket No. 2011-2199-IWD, 2012 WL 6625131, at *3 (Dec. 10, 2012)

⁴⁵ *Id.*

⁴⁶ *Id.* at *4.

amendment to its TPDES permit to SOAH.⁴⁷ Mr. Martin, a member of an association seeking a contested case hearing, fished in the Wilbargers Bend area of the Colorado River on a near-weekly basis; the Wilbargers Bend area was about one mile downstream of the Corix outfall and Mr. Martin had fished that same area continuously for 50 years.⁴⁸ In contrast to Mr. Martin's clear personal justiciable interest in Corix, none of SABEW's members articulate recreational interests that support a finding of affected-person status. SABEW's members hunt and fish in areas far downstream of the Facility's outfalls, and no member claims to regularly use the Victoria Barge Canal for recreational activity.

Here, SABEW and its members only refer to generalized interests across multiple water bodies (San Antonio and Guadalupe Bays, the Victoria Barge Canal, and Mission Lake). SABEW's request focuses on the presence of plastics and unspecified impacts on shrimp and oyster populations without any cited studies linking those observations as to cause and effect or linking any such observations to the Facility's discharges or the amendments proposed in the Application. SABEW's members also fail to account for other industrial discharges in the area, making it impossible to isolate the Facility's contribution to any observed water quality problems. Furthermore, their assertions concerning economic, recreational, and property interests are too speculative and conjectural to meet the legal threshold for standing. In contrast, the Corix proceeding, while involving contested claims, presented evidence regarding specific water quality parameters, the proximity of the discharge to the affected areas, and the potential for increased flow to impact water quality standards.⁴⁹ Nothing in SABEW's request provides the fairly

⁴⁷ See TCEQ, *Interim Order Concerning the Application by Corix Utilities (Texas), Inc., For a Major Amendment to TPDES Permit No. WQ0013977001*; Docket No. 2023-1591-MWD (Feb. 13, 2024).

⁴⁸ See *Executive Director's Response to Hearing Request, Corix Utilities Texas, Inc. Permit No. WQ0013977001*, Docket No. 2023-1591-MWD, at *5 (Jan. 12, 2024).

⁴⁹ *Id.*

traceable causal link that existed in the Corix proceeding.

In any event, SABEW’s members’ observations regarding past impacts of discharged plastic pellets and other existing water quality issues in the affected waters have little bearing on the Application itself, the purpose of which is to enable the Applicant to treat stormwater from the Outfall 006 drainage area in the stormwater treatment system and then discharge the treated stormwater at Outfall 002.⁵⁰ Under *Lujan*, there must be a “causal connection between the injury and the conduct complained of,” which in this case pertains to the Commission’s decision to issue this *particular* Permit.⁵¹ Denying the permit would not redress the concerns raised by SABEW and its members.⁵² In fact, the changes proposed to be authorized by the Application will significantly improve discharges from the Facility.

Nothing in the amended Permit, if issued by the Commission, would limit the ability of SABEW’s members to hunt and fish, or authorize the Applicant to exclude SABEW’s members from public areas where they hunt or fish (or, in the case of Mr. Daniel, his own property). In an attempt to add constitutional force to its request, SABEW cites Article I, Section 34 of the Texas Constitution, which recognizes that “[t]he people have the right to hunt, fish, and harvest wildlife, including by the use of traditional methods, subject to laws or regulations to conserve and manage wildlife and preserve the future of hunting and fishing.” SABEW then cites a recent concurrence (without identifying it as such) that accompanied the Supreme Court of Texas’s recent decision in *Texas Department of State Health Services v. Crown Distribution LLC*.⁵³ The concurrence simply recognizes the existence of the right to hunt and fish alongside other rights protected by the Texas

⁵⁰ In making determinations regarding affected-person status, the TCEQ may evaluate claims with respect to the “merits of the underlying application” itself. See *TCEQ v. Sierra Club*, 455 S.W.3d 228, 235 (Tex. App.—Austin, 2014).

⁵¹ *Lujan*, 504 U.S. at 560.

⁵² See *id.* at 561.

⁵³ 647 S.W.3d 648, 664 (Tex. 2022) (Young, J., concurring).

Constitution.⁵⁴ The majority opinion in that case concluded (in a judgment supported by the concurring judges) that Texas law appropriately prohibited the appellee from manufacturing and processing smokeable hemp products despite the guarantees in the Texas Constitution to economic liberty.⁵⁵ No court construing the right to hunt or fish has concluded that the constitutional recognition of the right confers standing in administrative processes or otherwise limits the Commission's ability to lawfully implement the provisions of or issue permits pursuant to the Texas Water Code.⁵⁶ And, again, nothing in the amended Permit would restrict SABEW's members' ability to exercise their rights.

In sum, no SABEW member alleges that discharges from the outfalls will cause degradation or impairment of the waters aside from conclusory and speculative statements about increased flows. To the extent SABEW members complain of existing issues in the waters where they recreate, those claimed injuries are not traceable to this Application because the amended Permit would enable the Applicant to *reduce* solids discharges. Because no member of SABEW has shown a personal, justiciable interest in this Application, SABEW lacks affected association status and the Commission should deny its request for a contested case hearing.

2. John Daniel's Individual Hearing Request

John Daniel submitted a contested case hearing request in his individual capacity on July 18, 2024. As discussed above, Mr. Daniel's place of residence and his additional properties are several miles northwest of the Facility's outfalls and will not be affected by the amendment of the

⁵⁴ *See id.* at 677.

⁵⁵ *See id.* at 652–55.

⁵⁶ *See In re State for J.M.P.*, 687 S.W.3d 746 (Tex. App.—Dallas, 2024) (Miskel, J., concurring) (considering that the existence of the hunting and fishing right signaled that hunting feral hogs was in the policy interests of the state of Texas); *Hinds v. State*, 2021 WL 2834717 (District Court of Lampasas, 2021) (unpublished opinion) (noting that the appellant failed to establish how the right rendered his conviction for cockfighting unconstitutional); *Zaatari v. City of Austin*, 615 S.W.3d 172 (Tex. App.—Austin, 2019) (citing the section when describing the Texas Bill of Rights).

Permit. In his individual request, Mr. Daniel states his concern that the Application may affect his enjoyment of his property, which consists of farming, ranching, and hunting activities. Mr. Daniel worries about the impacts of the Facility on wildlife species of interest to him. Mr. Daniel also expresses concern about the Facility's impacts on the water well on his property. Mr. Daniel then describes a number of issues he has, alongside SABEW, with the Application.

Despite his proximity to the Facility, Mr. Daniel makes no claim to own real property on any water course or tidally influenced water body affected by the changes that would be authorized by the requested amendment. Mr. Daniel also expresses no continuing recreational, aesthetic, or other interests in any of the water courses or waterbodies downstream of the Facility. Mr. Daniel lives to the northwest of the Facility, and the Facility's discharges will flow generally south through the Facility's outfalls toward the water courses and waterbodies described above. The Facility's changes to its discharges will not affect the well-being of farm and ranch animals or wildlife on Mr. Daniel's property; Mr. Daniel offers no explanation for how the discharges authorized by the Permit could potentially affect these species. Further, the discharges authorized by the Permit are surface water discharges, not discharges or injections into groundwater that could affect his water well. Although Mr. Daniel articulates concerns about environmental impacts, he does not articulate the required personal justiciable interest in the Application that is not common to members of the general public. As such, these requests should be denied.

V. SABEW's Request for Reconsideration

Texas Water Code Section 5.556 provides that a person may request that the Commission reconsider the Executive Director's decision on a TPDES permit application. TCEQ rules require that a request for reconsideration of the Executive Director's decision must meet the following requirements:

- (1) The request must be in writing and be timely filed by United States mail,

facsimile, or hand delivery with the Chief Clerk;

- (2) The request should contain the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; and
- (3) The request for reconsideration must expressly state that the person is requesting reconsideration of the Executive Director's decision and give reasons why the decision should be reconsidered.⁵⁷

Neither the Texas Water Code nor any TCEQ rule provides a standard for determining when the Commission should grant a request for reconsideration.

The Commissioners' Integrated Database identifies that SABEW filed a request for reconsideration along with its request for a contested case hearing. SABEW's request for reconsideration fails to raise a material fact issue or identify a basis upon which the Executive Director's decision should be reconsidered. Instead, the SABEW's request for reconsideration merely reiterates SABEW's differences of opinion on procedural and technical decisions made by the Executive Director with the support of TCEQ's Water Quality Division in preparing the Permit. The requests for reconsideration generally restate issues that SABEW made in its comments and that have been addressed by the Executive Director in the RTC, following the Executive Director's thorough consideration of the Application, public comments, and the contents of the administrative record. Thus, the request fails to identify any issue that merits sending the Application back to the Executive Director for reconsideration and should therefore be denied.

VI. Conclusion and Prayer

For the reasons discussed above, the Applicant respectfully requests that the Commission deny the contested case hearing requests and requests for reconsideration, adopt the Executive Director's Response to Public Comments, and issue TPDES Permit No. WQ0000447000.

⁵⁷ 30 TEX. ADMIN. CODE § 55.201(e).

Dated: February 14, 2025

Respectfully Submitted,



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ATTORNEYS FOR DOW HYDROCARBONS &
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CORPORATION

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Dow Hydrocarbons & Resources LLC's and Union Carbide Corporation's Response to Requests for Contested Case Hearing and Requests for Reconsideration was filed electronically with the Texas Commission on Environmental Quality on February 14, 2025. I further certify that a copy of the foregoing was sent to all persons on the attached mailing list via U.S. mail.



Whitney L. Swift

MAILING LIST
DOW HYDROCARBONS & RESOURCES LLC AND UNION CARBIDE CORPORATION
DOCKET NO. 2025-0080-IWD; PERMIT NO. WQ0000447000

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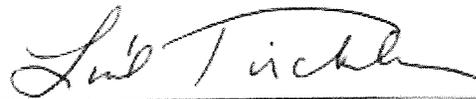
*Counsel for San Antonio Bay Estuarine
Waterkeeper*

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Discharge Elimination System ("TPDES") Permit No. WQ0000447000, related to Applicant's Seadrift Operations. I prepared the attached maps using the Google Earth application and its distance measurement tool.

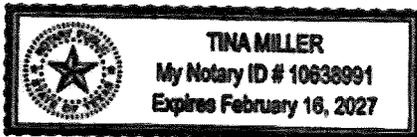
4. Attachment A-1 shows the location of the Seadrift Operations; the location of Outfalls 001/002; the Victoria Barge Canal; the entrance to the Victoria Barge Canal; and the approximate distance from Outfalls 001/002 to the entrance of the Victoria Barge Canal, which is about 4.9 miles. The Google Earth map also shows the locations of Mission Lake, Guadalupe Bay, and Hynes Bay.

5. Attachment A-2 shows the location of the Seadrift Operations; the location of Outfalls 001/002; and the entrance of the Victoria Barge Canal. These are shown in relation to Mission Bay, Guadalupe Bay, Hynes Bay and San Antonio Bay, shown on the Google Earth map.



Lial Tischler, Ph.D., P.E., B.C.E.E.

Sworn to and subscribed before me by Lial Tischler on this 13th day of February, 2025.



Notary Public in and for the State of Texas

ATTACHMENT A-1

Mission Lake/Hynes Bay - Segment 2462

Discharge Route - Seadrift Operations TPDES WQ0000447000

TPDES WQ0000447000
Outfalls 001-0002

Victoria Barge Canal
Segment 1701

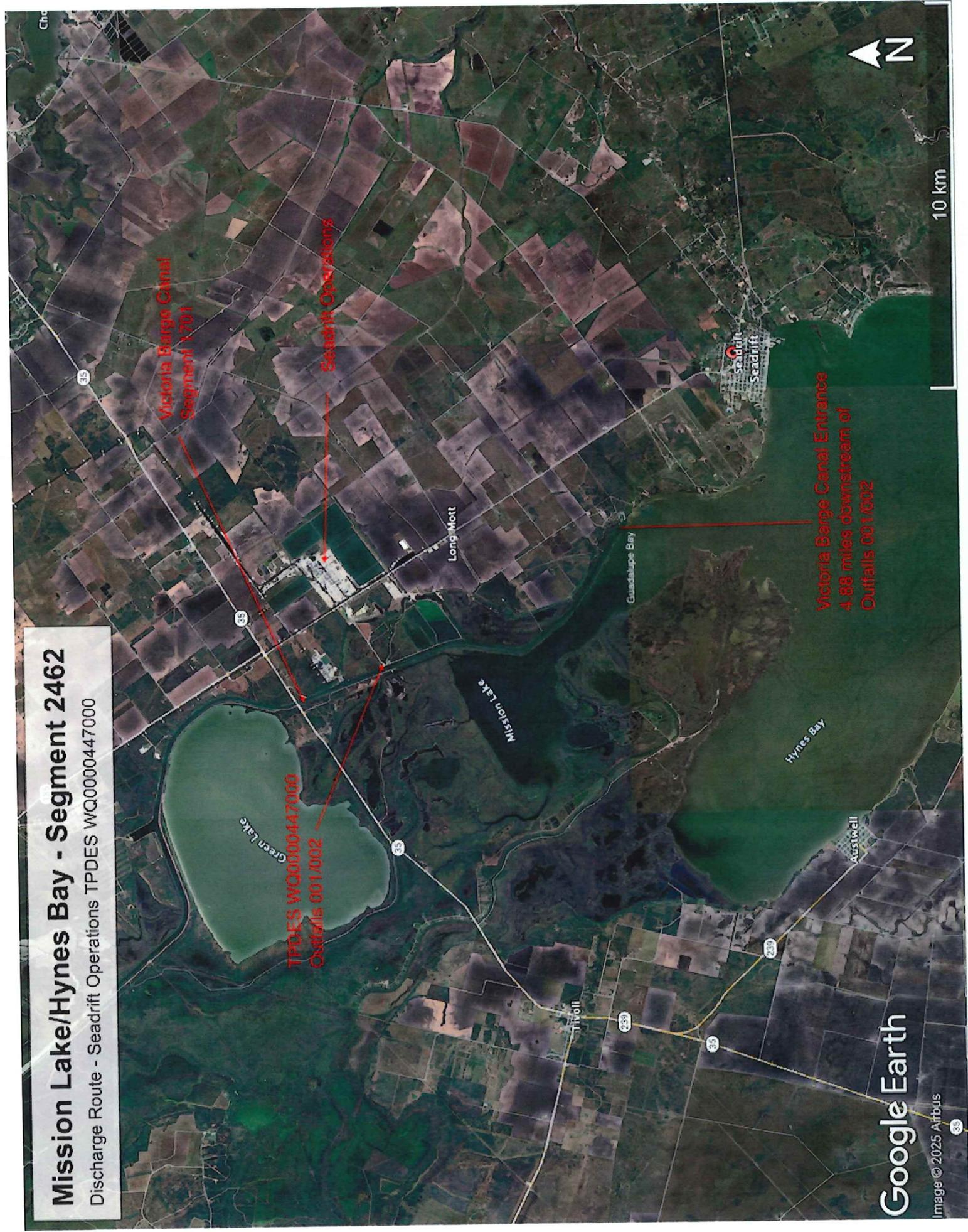
Seadrift Operations

Victoria Barge Canal Entrance
4.88 miles downstream of
Outfalls 001-0002

Google Earth

Image © 2025 Airbus

10 km



ATTACHMENT A-2

San Antonio Bay System

TPDES WQ0000447000
Outfalls 001-0002

Seawall Operations

Long Mott

Mission Lake

Guadalupe Bay

Hynes Bay

Austwell

Seadrift
Stadiff

Victoria Barge Canal
Entrance

San Antonio Bay



10 km

Google Earth

Image © 2025 Airbus