

Transcript of the Texas Surface Water Quality Standards Public Hearing May 2nd, 2022

Gwen Ricco: The time is now 10:00 AM, and we'll stop the informal Q&A session and begin the formal process of the hearing to receive formal testimony on this rulemaking proposal. If you have opted to provide formal oral comments at this hearing, please mute your mic until I call on you, and I will call each commenter in order of registration. If you are just now joining us, please put your mic on mute by dialing star six. I would like to welcome everyone to this public hearing being conducted by the Texas Commission on Environmental Quality. My name is Gwen Ricco.

If you intend to present oral testimony and have not already signed in, please sign in now by sending an email to rules@TCQ.texas.gov. We will continue to accept written comments on this proposed rule until midnight on May 2nd, 2022. The virtual hearing is structured strictly for the receipt of oral comments. Open discussion during the formal session of the hearing is not allowed. However, if anyone has additional questions or informal comments regarding this proposal, there will be another opportunity after the hearing to have your informal questions answered.

We will now begin receiving testimony in the order in which you registered. Once I call your name, either come up to the podium or please unmute your mic and state your name and who you represent. Then present your testimony. Upon conclusion of your testimony, please mute your mic to allow the next participant. We will now begin receiving our comments.

In our first registered participant, Alex R Ortiz from the Sierra Club Lone Star Chapter, if you could come up to the podium. And if you want to speak into the mic this over here, sorry. I could just speak into it over here.

Alex Ortiz: Awesome, cool.

Gwen Ricco: OK. And actually, gotta be through the computer so you don't...okay. I don't do anything. You're good.

Alex Ortiz: Good morning. My name is Alex Ortiz, and I'm the water resources specialist for the Lone Star Chapter of the Sierra Club. The Sierra Club is the nation's oldest conservation organization and has been working to protect Texas water since 1965 with over 28,000 members in Texas. The Sierra Club is also submitted written comments receiving sign on from other state and local organizations. Our written comments pretty extensive, so I'm gonna try and keep it fairly short in terms of what I'm addressing.

The first thing that I wanna touch on is the need for an extension of the public comment period. Sorry, I am out of breath. The original public notice was published in the *Texas Register* on March 25th, and then there was a correction of error published on April 15th which contained a significant portion of the new proposed rules, including the prohibition on pre-production plastic discharges. So, it's just really important that we extend that to meet the statutory deadline starting from April 15th to May 15th.

On the plastic prohibition itself, I do wanna talk a little bit about whether or not there's this feasibility determination of the way that it's phrased in the proposed rules, right? Now it is a little ambiguous and let, umm, we should not be expecting there to be a feasibility determination but rather we should be expecting an infeasibility determination. So, the goal should be to make sure that a potential discharger has to show, with substantial cause, that a proposed control for plastic pollution is infeasible. Not that, you know, the commission or someone else instead should have to show that it is feasible for a potential discharger to meet controls additionally in terms of this phrase "economic practicability and achievability in light of best industry practices." That is not necessarily appropriate in this context. Just because "best industry practices" are still like actively developing around pre-production plastic controls. Pre-production plastic pollution addressing that problem is still fairly new, and while we need to be doing the most that we possibly can, it's

really important that we don't give a potential discharge an easy out by saying it's infeasible because of economic practicability. And in this particular case, economic practicability is so greatly outweighed by the public interest in keeping surface waters and wildlife microplastic free. We know that microplastics have a really large detrimental impact on human health and the environment, the concentration of toxins, carcinogens on the surface of any microplastic can be so many times greater than that in the ambient water itself.

I do want to talk on antidegradation just briefly, and this is an issue that the Sierra Club and our joint commenters have been working on for quite some time. We would like to see either some clarification or the removal of the de-minimis exception in terms of antidegradation. We know that these sorts of limiting phrases are allowed under the Clean Water Act. EPA has traditionally allowed them, but they do need to be unambiguous, and that has been pretty well settled at multiple levels of litigation in other circuits. So rather than waiting for litigation to prompt some sort of larger scale, de-minimis change, the commission has the ability to do that right now, and this seems like a really opportune time.

Additionally, I do want to touch on salinity gradients. For about 20 years, TCEQ has had the ability to regulate, more specifically, on numeric salinity criteria for salinity gradients in our bay and estuarine systems and has failed to do so. It's unclear to the public what steps TCEQ has really taken to establish this salinity gradient needs in our bay and estuarine systems. There should be pretty active coordination with Parks and Wildlife and probably the Water Development Board to better understand coastal salinity gradients. Because this is not only...does it become a public health issue in terms of where we can sort of get drinking supply and understanding permitting around desalinization discharges, but it's also a really important endangered species and wildlife issue. The small-tooth sawfish is the example we've given our written comments of is just one species that has almost been completely extirpated from the Texas coast because it needs a very, like, low brackish level of salinity as a juvenile, and it can no longer find that salinity in the tex, on the Texas coast. It is a federally endangered species, and part of restoring coastal habitat will mean not only regulating salinity gradients as they exist now but taking a look back into historical context to figure out what the salinity gradients were needed at the time that the sawfish was listed, for example.

Also, numeric nutrient criteria. We supported the pristine streams petition that came before the commission earlier this year, and I think part of the thing that really needs to be noted about the development of possible numeric nutrient criteria from the perspective of pristine streams is that we might not be in this situation of only having 22 remaining pristine streams if we had adopted numeric nutrient criteria sooner. The state has been working on sort of mapping out and researching for the better part of two decades on how to establish numeric nutrient criteria. It's really unclear what progress that work group has made, especially in the last three years they've not been regular meetings. We give our...in our written comments, we give the example of the Florida Department of Environmental Protection and how they've started tackling it. Florida, as a Gulf Coast state and equally mired by harmful algal blooms problems, is a really, really good example of how we can start to address numeric nutrient criteria and prevent additional numeric...I mean a nutrient pollution. We know that nutrient pollution causes harm to people, wildlife, harmful algal blooms, etc. And much like with this salinity gradients, I do wanna make sure that it's very clear that with the development of nutrient criteria, again, we do need to be looking at the historical context of what we needed to control our nutrient pollution 20 years ago. Not what's needed right in the moment. We really need to be looking back to sort of rehabilitate to the maximum extent possible.

And finally, the last thing I want to talk about just briefly is bacteria. There have been frequent rollbacks of recreational use categories in terms of them being split up from, you know, primary contact recreation and secondary contact recreation to one and two of both of those. And the Sierra Club joint commenters are really just hopeful that we can see some consolidation of those at the more stringent of for those limits. We really, really want to make sure that we're protecting human health and the public to the best that we can, especially in recreation. And I also wanna

draw's attention just to the story that came out in *Texas Monthly* earlier this week about fecal bacterial indicators in the bay. I thought it was a fantastic piece. I included some of that research in our written comments as well, talking about steps that TCEQ could take to address fecal...it...the insufficiency of fecal indicators.

And I think with that I am done. Thank you so much for the opportunity to comment, and we're available for any questions that may be needed.

Gwen Ricco: And we thank you for that comment and our next registered oral presenter is Neil McQueen from the Surfrider Foundation.

I can just speak, add it and you're good to go.

Neil McQueen: Sure. Good morning. Thanks for the opportunity to comment. We already submitted written comments cosigned by 20 other concerned organizations and individuals, but I'm just going to hit on some of the main points here regarding the proposed changes for pre-production plastics. On the definition for people...pre-production plastic, the section 307.3, we recommend that the term "organic polymers" be replaced with "petroleum and biologically derived polymers" since according to EPA's Trash Free Waters program, polymers that are made - doesn't matter if they're made for more petroleum or biological based materials. Once they're manufactured, they can have the same detrimental effects in the environment. We do support the new language at Section 307.4(b)(8), prohibiting the discharge of pre-production plastic with the following considerations and additions.

We're concerned that the term "visible means being able to see that by the naked eye without special equipment" leaves no discharge...the prohibition open to interpretation that may allow regulated facilities to claim discharge plastics were not visible. To that end, the term visible should be further defined as able to see with the naked eye without special equipment from a distance of three feet. If a person requires prescription eyeglasses or contact lenses to achieve normal vision, those must be worn while monitoring for potential discharges. Next point is that even though the discharged plastics may be visible, they can be difficult to find if the person doing the monitoring doesn't know where to look for them. So, at times the discharged plastic can be hidden by vegetation or other organic matter. Therefore, that section should include the retired... requirement that a person conducting monitoring must exercise reasonable effort to locate discharged plastics in and along the shoreline of water bodies, near facility outfalls, and under vegetation, leaves or sticks that may obscure the person's view on the ground. Next point is that we are concerned that the rule contains no obligation to conduct monitoring, monitoring no punishment for the failure to do so, and no requirement to report a discharge to TCEQ. Spilled or discharged pre-production plastic must be regulated as a Class 2 industrial solid waste, according to a retired inspector for the TCEQ. I understand if it does not have that waste classification, then there is no sort of enforcement action that can be taken.

Finally, the rule should contain some elements which were in House Bill 3814, which was filed in the last legislative session, and that is that the regulated facilities must make a report to TCEQ within two days after a discharge or release is detected and clean ups must be done without harm to the ecosystem. Secondly, containment systems must be designed to maintain to capture floating and sinking plastics and have the capacity to handle precipitation from a 100 year 24-hour storm, which are occurring now in Texas.

Lastly, TCEQ must inspect the facility for eligibility before granting an applicant's conditional no exposure exclusion for the industrial MSGP stormwater permit. And some of these comments are based on my experience over 25 years of experiences in environmental consultant I have stormwater clients here in Texas. Thank you.

Gwen Ricco: And we thank you for your comment, our next registered presenter is Jace Tunnell and I get your name correct. Okay. Thank you. And didn't come present. Yeah, it's just speaking at the laptop.

Jace Tunnell: Okay. Thanks for letting us come and give some comments today. Real important.

My name is Jace Tunnell, and I'm with the University of Texas Marine Science Institute in Port Aransas, TX and also founder of Nurdle Patrol, which looks for it's a citizen science project that looks for plastic pellets concentrations on rivers, lakes, and shorelines.

So, there's a couple of things that I'd like to just kind of bullet here from my comments, and I did send these in online. So, it's more just kind of confirming, but I support the proposed rule to change...to ban visible pre-production plastics from being discharged from both stormwater and wastewater systems. The proposed rules need to identify accountability mechanisms, such as ways of monitoring wastewater and stormwater with engineering solutions, for example. For most of plastics, has and auto sampler on their wastewater discharge to monitor the amount of plastics being discharged into the bay. This type of sampler could be required for all plastic manufacturers. Monthly reporting should be required with a detailed account of stormwater and wastewater discharge.

All of any amount of plastics found that could lead off property and into Texas waters - permittees should be required to report and clean up spills inside and outside their fence line within 24 hours after plastics are recorded spilled or discharge. Pre-production plastics must be regulated as a Class 2 industrial solid waste. Make all reporting of plastic pellets, flakes, and powder violations. Spills and turn around plastic facilities make reporting an incident easy for citizens to submit, such as with a phone app. Then my final comment here is have a strict enforcement policy when plastics are found that could be discharged to state waters or have already reached state waters. Enforcement should include best management practices in addition to meaningful fines that are appropriate for the size of company that have the violations.

Thanks again for having me.

Gwen Ricco: We thank you for your comment, and we have one more registered presenter. If you could, please come up and state your name and who you represent and present your testimony.

Amy Johnson: Is it okay if I turn this a little bit like this? And I'm...the microphone is here, right? My name is Amy Johnson. I am the lead attorney in the Waterkeeper versus Formosa case, which under which I think a lot of this came out of my client as my clients are Diane Wilson, a fourth-generation shrimper and San Antonio Bay Estuary and Waterkeeper, which we just called Waterkeeper because it's a mouthful to say all of that. And this was a Clean Water Act Case that was brought against Formosa Plastics for the discharge of pellets and powder from its facility in Point Comfort, Texas. It is the largest citizen suit ever in the US, it's settled for \$50 million, and included in the settlement are requirements to retrofit the facility for zero discharge of plastics from stormwater and wastewater, a cleanup of all the discharged plastics, which goes down a creek and into the bay, and ongoing monitoring. So, I will tell you that I probably spend three hours a day still on this and this was settled in 2019. The cleanup hasn't started...the building of the engineering hasn't started, the monitoring has been going on, and lots of money has been given for research and all kinds of wonderful things that I'd love to tell you about. But that's not what's before you right now. So, what I want to talk about a little bit is some specific things we've learned from our case and from our experience that I think would be useful in the rule.

First, I want to say I'm really glad that you put wastewater and stormwater wastewater, too, because our experience is that it's likely smaller plastics once they start paying attention. It's powders, they're likely going out through wastewater, some pellets, but they're going out in wastewater too. And the substantive suggestions of some kind of editing suggestions. But the substantive suggestions are requirement of monitoring.

That the company be required to look it's as they have told you. If you don't look and you don't try hard, you're not gonna see them. And it's not that they're not visible, they're visible. You have to know where to look. And plastics are lightweight, they float on water. Powder is sparkly and it looks like a little sparkle. We have sent you our comments, they were too big, so we've sent you a

mail-in set of comments and included in that are photos from monitoring of the wastewater in which you can see the powder...and they're just these, it looks like. They're just little sparkles on top of the water, and then if you put them in a plastic - you take of course a plastic bottle - put the plastic in that. Anyway, you put them in a bottle, and they float. Okay, that's the difference. Like there they float, and they sparkle, and they can be seen. They are visible. Now nano plastics, which are even smaller than what we can see, are also a problem. But I know it's hard to monitor for that. But so, this is the first step. But what? I will tell you. So, we've sent you some photos. Of what? And if you and if the water is moving...you gotta discharge and your water is moving. You don't necessarily see the plastics because it's moving and the water, and so when you have to look it's either, I mean, if there's a whole bunch, you can see them maybe if the water is moving. But you look after it stopped raining and after the water stopped flowing and you look you have to know where the water would have gone if you look at the outfall and it's rained rain, rain well, the plastics are over there. They're not at the outfall, and so if you tell them just to look at the outfall, they're not going to see them. So it's really important to require either post discharge or post rainfall monitoring.

Now for the wastewater part of the settlement, part of the Formosa settlement, was that our engineer, Dr. Isa Jose Sanchez who's out of Dallas, she's a stormwater engineer, could design what we call the wastewater sampling mechanism...and to call it a mechanism is kind of an understatement because it's probably as big as this room. It's a building. And it takes...it's got three different ways it looks it, Formosa waste, this treated effluent. It's been treated at the wastewater treatment plant. It's called the combined wastewater treatment plant there. It's been treated, it's in a pipe, it's going out to Lavaca Bay.

This mechanism takes 3.7% about of the water, and it does two things. One is there's what's an automatic sampling when the total suspended solids reach a certain level. It takes a sample and then I think it's 30 minutes later it takes another sample. And if the total suspended solids don't reach that level, it just takes a daily simple and since it started operating pretty continuously in June 2021. We're not even a year out, it has found 238 days of violations. Okay, so 238 days they've been putting plastics out into the bay. Now our agreement is that this year they pay \$20,000 every day that they do that and so right now, post decree, post \$50 million, we've got another \$5 million in violation fines.

So this wastewater sampling mechanism really works. It has a second thing, which is a net, but it's a specially designed magic net, I don't know. But it's this net that captures bigger pellets, bigger plastics, and the water goes through there continuously And I will tell you, if you look at the...what's in there, it's pretty dirty looking, but that's a different issue. But there...but it captures plastics. There's this other thing that can capture them, which is kind of like a bathtub, but we worked with Formosa on this facility, and they didn't think it was fair that the plastics were on the edge. It's like a bathtub ring that the plastics were on the edge of the bathtub ring could be cleaned sufficiently, so there's no magic comet to wash off your plastic. So, we agreed that it's only the net and this little sampler. You all can go see this, and I know what's happened is that COVID has made everything difficult, but it's not even on the Formosa facility and I...we've tried to invite y'all to come and we hope that you do. I know I'm not Formosa, but you can go on your own without me inviting you. But it is worth visiting, and I think I know it's different than what you would call traditional. What's it called? Best Management Practices.

But I think this is if what Formosa does - they look at that powder and they test it, and they know where it came from. So, I know about Formosa, I don't know about DOW, don't know about these other companies, but they likely make polypropylene or polyethylene, it's different mixes. And when you, when they test it, they know what unit it came from and that tells them you guys aren't cleaning up your pad or are you guys aren't doing this. So, I think it counts as a BMP and I think that you all should be looking at that as a BMP for plastic wastewater for plastic producing facilities.

I think that's then...I just have some like more kind of people, little details about the way the rule's written, and one is the definition of plastics actually comes from our consent decree, and

we previously...in previous comments we filed consent decree. So, you can look at that. We file some expert reports by Dr. Jeremy Conkel about plastics and all the things that attach to them and how awful they are. But one of the things we've learned...so the definition is pellets, powder, and flakes. When you think of a flake, it's you think of a thin shaving, right? And pellets you think of as a little particle and pellets are a little bit bigger. They're also are broken pellets or pieces of pellets. And we are right now in a debate with Formosa about whether those are pellets. And we've all been calling them flakes because they're broken off from pellets. But I would...the way that I suggested it is that you say pellets includes broken fragments of pellets. But I suggest that you address that issue because the last thing you want is them to go "It's not a powder and it's not a pellet because it's not rounded all the way," and in our comments with the WSM reports - we've sent you photos - you can see what broken pellets look like as well as a whole pellet. So that's in there too.

The other thing is about lots of times when plastic spill at a facility, one of the gut reactions is to wash it up, right? Because either you have to sweep or vacuum or wash - that's kind of what the world gives you right now. And if you wash it up, where it goes into your stormwater or your wastewater, and so you need to tell them not to do that because they're filling it up. Unless they have the capacity to stop it from going out, and that will tell you at this point the capacity to stop powders from going out is really tricky. And the capacity stopped pellets is hard to...I mean, they do float, so there's technology, but so what I would say is they should be swept. You shouldn't be putting them into your stormwater or your wastewater systems if they spill unless you are clear that you have a good mechanism to take them out because you're just, you're doing yourself. So, I believe that's all we...Waterkeeper is going to continue working on these issues. We will continue learning all kinds of things about pre-production plastics, and we really are happy that this rule is being proposed. We really do think you need to require monitoring, and I wish that you would have some really good penalties for violations, or, I mean, I think that this is a very, very financially successful industry, and \$5,000 penalty is just - it's like a little nick. It's not even a nick. It's insignificant. So serious enforcement is really important, but starting out with really good monitoring and helping industry figure out how to stop the discharge and is important, so thank you very much.

Gwen Ricco: And we thank you for your comment.

Is there anybody on the line who has not registered or would like to present formal testimony at this time? You can press star six to unmute your microphone.

If there are no further comments, the formal session of this hearing is now closed. We do appreciate your comments and we thank you for participating in this public hearing.