

Bryan W. Shaw, Ph.D., *Chairman*
Buddy Garcia, *Commissioner*
Carlos Rubinstein, *Commissioner*



Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

February 13, 2012

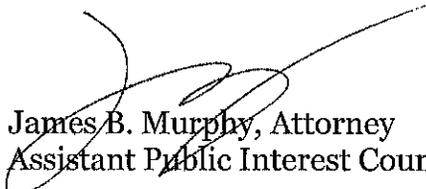
Bridget Bohac, Chief Clerk
Texas Commission on Environmental Quality
Office of the Chief Clerk (MC-105)
P.O. Box 13087
Austin, Texas 78711-3087

RE: SHERWIN ALUMINA, LP
TCEQ DOCKET NO. 2011-1215-AIR

Dear Ms. Bohac:

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

Sincerely,


James B. Murphy, Attorney
Assistant Public Interest Counsel

cc: Mailing List

Enclosure

TCEQ DOCKET NO. 2011-1215-AIR

**IN THE MATTER OF THE
APPLICATION OF**

**SHERWIN ALUMINA, L.P. FOR
RENEWAL OF AIR QUALITY
PERMIT NO. 46868**

BEFORE THE

**TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY**

**THE OFFICE OF PUBLIC INTEREST COUNSEL'S RESPONSE TO
REQUESTS FOR HEARING**

To the Honorable Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) of the Texas Commission on Environmental Quality (Commission or TCEQ) files this Response to Requests for Hearing in the above-referenced matter and respectfully shows the following.

I. Introduction

A. Background of Facility

Sherwin Alumina Company, LLC (Sherwin Alumina or Applicant) has applied to the Commission for renewal of New Source Review Permit No. 46868, which authorizes the continued operation of red scale handling and stockpiles at its alumina manufacturing facility, the Sherwin Alumina Plant. The permit authorizes discharge of particulate matter and particulate matter less than 10 microns in diameter (PM₁₀). The facility is located at 4633 Highway 361 E in Gregory, San Patricio County.

B. Procedural Background

The Commission received this application on December 6, 2010. On December 13, 2010, the TCEQ Executive Director (ED) declared the application administratively complete. According to an affidavit of publication submitted by

Applicant, the Notice of Receipt of Application and Intent to Obtain Air Permit Renewal (NORI) was published on January 7, 2011 in the *Corpus Christi Caller Times*. The ED completed technical review of the application and a draft permit on March 21, 2011. According to an affidavit of publication, the Notice of Application and Preliminary Decision for Renewal of an Air Quality Permit (NAPD) was published on April 2, 2011 in the *Corpus Christi Caller Times*. The public comment period ended on May 2, 2011, which was also the deadline to request a contested case hearing. On July 18, 2011, the ED filed his Response to Public Comment, which the Office of Chief Clerk mailed on February 1, 2012 along with the letter setting this matter for consideration by the Commission.

On January 24, 2011, the Commission received timely comments and requests for a contested case hearing from Kenneth Berry and Brenda Berry, Debbie Breaux on behalf of The Berry Company, and Rachel Ramos on behalf of Channel Investments, LLC (Protestants). OPIC recommends denying the hearing requests because there is no right to a contested case hearing on this renewal application.

II. Applicable Law

The ED declared this application administratively complete on December 13, 2010. Because the application was declared administratively complete after September 1, 1999, a person may request a contested case hearing on the application pursuant to the requirements of House Bill 801, Act of May 30, 1999, 76th Leg., R.S., § 5 (codified at TEX. HEALTH & SAFETY CODE § 382.056(n)).

Under the applicable statutory and regulatory requirements, a hearing request must substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request;

identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility or activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the comment period that are the basis of the hearing request; and provide any other information specified in the public notice of the application.

30 TEX. ADMIN. CODE (TAC) § 55.201(d).

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."

30 TAC § 55.203(a). This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(a). Governmental entities with authority under state law over issues contemplated by the application may be considered affected persons.

30 TAC § 55.203(b). Relevant factors 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; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 TAC § 55.203(c).

A group or association may request a contested case hearing if:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organization's purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

30 TAC § 55.205(a). The ED, OPIC, or applicant may request the group or association provide an explanation of how the group or association meets these requirements.

30 TAC § 55.205(b).

The Commission shall grant an affected person's timely filed hearing request if:

- (1) the request is made pursuant to a right to hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Accordingly, responses to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or of law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the Chief Clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

30 TAC § 55.209(e).

There is no right to a contested case hearing for the "amendment, modification, or renewal of an air application that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted." 30 TAC § 55.201(i)(3)(C). The Commission may, however, "hold a contested

case hearing if the application involves a facility for which the applicant's compliance history contains violations that are unresolved and that constitute a recurring pattern of egregious conduct that demonstrates a consistent disregard for the regulatory process, including the failure to make a timely and substantial attempt to correct the violations[.]” 30 TAC § 55.201(i)(3)(C). The Commission may also hold a contested case hearing if it “determines that the application involves a facility for which the applicant's compliance history is in the lowest classification under Sections 5.753 and 5.754 [of the Texas] Water Code, and rules adopted and procedures developed under those sections.” TEX. HEALTH & SAFETY CODE § 382.056(o).

III. Discussion

Under TEX. HEALTH & SAFETY CODE § 382.056(o) and 30 TAC § 55.201(i)(3)(C), there is no right to a contested case hearing for the renewal of an air permit unless the applicant seeks to increase its allowable emissions or emit an air contaminant not previously emitted, the facility's compliance history contains unresolved violations and demonstrates a consistent disregard for the regulatory process, or the facility's compliance history is rated in the lowest classification. Sherwin Alumina seeks renewal of its air permit without an increase in allowable emissions and without authorization to emit a new air contaminant.

In their contested case hearing requests, Protestants allege Applicant released caustic, alumina, and bauxite materials on their properties, wetlands, duck ponds, and beaches for the 24 months prior to the requests. They allege Applicant has refused to comply and the Commission has failed to enforce against Applicant for the violations.

Despite the allegations of emissions violations, it does not appear Applicant's compliance history for the facility is rated in the lowest classification or contains

unresolved violations that demonstrate a consistent disregard for the regulatory process. The Commission has rated the compliance history of Sherwin Alumina, LP¹ as “average” with a score of 4.49, well below the threshold of 45 points for poor performers. *See Compliance History Report for Customer Number CN603527359, available at <http://www11.tceq.texas.gov/oce/ch/>.* The Commission has rated the compliance history of this authorization—Permit No. 46868—at the Sherwin Alumina Plant as “average” with a score of 4.74. *See Compliance History Report for Regulated Entity Number RN102318847, available at <http://www11.tceq.texas.gov/oce/ch/>.* In addition, the Commission has rated the compliance history of all authorizations at the Sherwin Alumina Plant as either “average” or “high.” *See Compliance History Report for Regulated Entity Number RN102318847, available at <http://www11.tceq.texas.gov/oce/ch/>.* Based on these ratings, OPIC cannot conclude Applicant has demonstrated a consistent disregard for the regulatory process. Although Protestants allege the Commission has failed to enforce against Applicant’s discharge of pollution on the Protestants’ property, there is no evidence before OPIC demonstrating Applicant’s disregard for Commission enforcement actions or the regulatory process. Accordingly, OPIC concludes there is no right to a contested case hearing for this application.

///

///

///

///

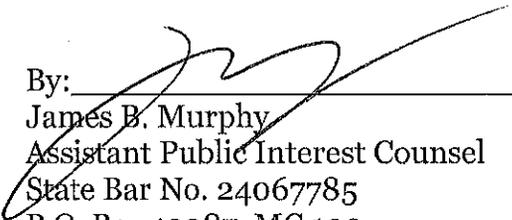
¹ Note that Applicant is listed as Sherwin Alumina Company, LLC in the ED’s Response to Comments and most of correspondence in the Chief Clerk’s file, but as Sherwin Alumina, LP under the Customer Number (CN) associated with this permit.

IV. Conclusion

OPIC recommends denying the hearing requests because there is no right to a contested case hearing on this renewal application.

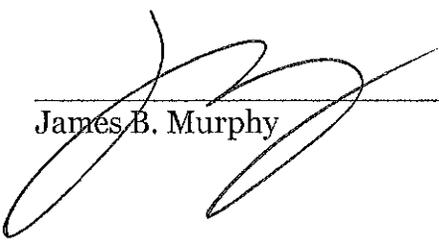
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By: 
James B. Murphy
Assistant Public Interest Counsel
State Bar No. 24067785
P.O. Box 13087, MC 103
Austin, Texas 78711-3087
(512) 239-4014 Phone
(512) 239-6377 Fax
James.Murphy@tceq.texas.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2012 the original and seven true and correct copies of the Office of Public Interest Counsel's Response to Requests for Hearing 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.


James B. Murphy

**MAILING LIST
SHERWIN ALUMINA, LP
TCEQ DOCKET NO. 2011-1215-AIR**

FOR THE APPLICANT:

Sandra J. Bailey, Environmental
Manager
Austin Mooney, Technology Director
Sherwin Alumina Company, LLC
P.O. Box 9911
Corpus Christi, Texas 78469-9911
Tel: (361) 777-2204 Fax: (361) 777-2219

FOR THE EXECUTIVE DIRECTOR

via electronic mail:

Betsy Peticolas, 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

Bonnie Evridge, Technical Staff
Texas Commission on Environmental Quality
Air Permits Division, MC-163
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-5222 Fax: 512/239-1300

Beecher Cameron, Technical Staff
Texas Commission on Environmental Quality
Air Permits Division, MC-163
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-1495 Fax: 512/239-1300

Brian Christian, Director
Texas Commission on Environmental
Quality
Small Business and Environmental
Assistance Division
Public Education Program, MC-108
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4000 Fax: 512/239-5678

FOR ALTERNATIVE DISPUTE
RESOLUTION

via electronic mail:

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087
Austin, Texas 78711-3087
Tel: 512/239-4010 Fax: 512/239-4015

FOR THE CHIEF CLERK:

Bridget C. Bohac
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

REQUESTERS:

Kenneth Berry
Brenda Berry
3746 Castle River Dr.
Corpus Christi, Texas 78410-3614

Debbie Breaux
2802 N. Shoreline Blvd.
Corpus Christi, Texas 78402-1006

Rachel Ramos
3801 Castle Knoll Dr.
Corpus Christi, Texas 78410-3635