

**TCEQ DOCKET NO. 2022-0738-IWD**

<b>APPLICATION OF OXY VINYL, LP</b>	<b>§</b>	<b>BEFORE THE</b>
<b>FOR RENEWAL AND MAJOR</b>	<b>§</b>	<b>TEXAS COMMISSION ON</b>
<b>AMENDMENT OF TPDES PERMIT NO.</b>	<b>§</b>	<b>ENVIRONMENTAL QUALITY</b>
<b>WQ0001539000</b>	<b>§</b>	

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**OXY VINYL, LP RESPONSE TO  
REQUEST FOR CONTESTED CASE HEARING**

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

Applicant Oxy Vinyls, L.P. (“Oxy”) files this response to the request for contested case hearing of Oxy’s application for renewal and major amendment of TPDES Permit No. WQ0001539000 (“Application”) and, in support thereof, would respectfully show that the sole commenter and hearing requestor, Bayou City Waterkeeper (“BCW”), did not identify a member of the group that would be an affected person in the person’s own right. In fact, BCW did not identify any member in its comment letter, and therefore failed to demonstrate that it meets the requirements established in statute and agency rule and the Commission should accordingly deny its contested case hearing request.

**I. Introduction**

**A. Facility and Amendment Description**

Oxy owns and operates the Battleground Plant, a chlor-alkali manufacturing facility, located in La Porte, Texas (the “Battleground Facility”). The Battleground Facility produces caustic (sodium hydroxide), chlorine, and hydrogen using a diaphragm cell process.

Oxy seeks to 1) increase the daily average flow for Outfall 001 from 2.15 million gallons per day (MGD) to 2.40 MGD with corresponding increases in mass and concentration limits for

copper, lead, nickel, and zinc; and 2) increase the daily average limit for total suspended solids for Outfall 001 from 448 pounds/day to 600 pounds/day based on increased flow and production. Treated effluent is discharged via Outfalls 001 and 002 to Phillips Ditch, to Santa Anna Bayou, to the Houston Ship Channel/San Jacinto River Tidal in Segment No. 1005 of the San Jacinto River Basin.

There are two final outfalls authorized by Oxy's current TPDES permit: 1) Outfall 001 is the process water outfall; and 2) Outfall 002 is for stormwater and utility water discharge. The proposed increase in daily average flow limit at Outfall 001 provides the Battleground Facility improved control over water levels in its Storm Water Reservoir (SWR) as well as increased opportunity to treat SWR wastewater and reduce process wastewater discharges via stormwater Outfall 002.

## **B. Procedural Background**

Oxy's Application was received by the TCEQ on December 30, 2019 and declared administratively complete on February 3, 2020. The Notice of Receipt and Intent to Obtain a Water Quality Permit ("NORI") was published in English in the *Houston Chronicle dba Pasadena Citizen* on February 26, 2020, and in Spanish in *Periódico Información* on February 26, 2020. The Executive Director's (ED's) staff completed the technical review of the application on September 7, 2021 and prepared a draft permit. The Notice of Application and Preliminary Decision ("NAPD") was published in English in the *Houston Chronicle dba Pasadena Citizen* on November 10, 2021, and in Spanish in *Periódico Información* on November 11, 2021. The comment period for this Application ended December 13, 2021. The ED issued a Response to Comments on March 3, 2022. The deadline for requesting a contested case hearing or reconsideration of the ED's decision was April 7, 2022.

## II. Legal Standards Governing Hearing Requests

The Commission may not grant a request for a contested case hearing unless the Commission determines that the request was filed by an affected person as defined by Section 5.115. Tex. Water Code § 5.556. Per Section 5.115(a), an affected person means “a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest.”

State law further establishes that “the commission may **not** find that a group or association is an affected person **unless** the group or association identified by name and physical address **in a timely request for a contested case hearing**, a member of the group or association who would be an affected person in the person’s own right.”<sup>1</sup>

Commission rules provide that a request for a contested case hearing shall be granted if the request is made by an “affected person” and it complies with the requirements of § 55.211 of this title (relating to Commission Action on Reconsideration or Contested Case Hearing).<sup>2</sup> A contested case hearing request must substantially comply with the requirement to 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.<sup>3</sup>

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<sup>1</sup> Texas Water Code Section 5.115(a-1)(2)(A); 30 TAC Section 55.205(b) (emphasis added). The Application was received by the TCEQ on December 30, 2019. Because the Application was declared administratively complete after September 1, 1999 and received after September 1, 2015, it is subject to the procedural requirements adopted pursuant to House Bill 801, 76th Regular Session, 1999, and Senate Bill 709, 84th Regular Session, 2015.

<sup>2</sup> 30 TAC Section 55.211(c)(2)(D)

<sup>3</sup> 30 TAC Section 55.201(d)(2).

### III. Analysis of Hearing Requestor's Status as Affected Person

The sole commenter and hearing requestor, Bayou City Waterkeeper, failed to demonstrate it meets the affected person requirements established in statute and agency rule, and the Commission should accordingly deny its contested case hearing request.

On December 8, 2021, BCW submitted its single comment letter on the Application (“BCW Comment”). BCW concluded its comments by requesting a contested case hearing, “but requests the hearing be held when the time is proper.” The BCW Comment did not identify a name or a physical address of a member withstanding in his or her own right nor did it formally request a contested case hearing following the Executive Director’s filing of the Response to Comments (RTC)—which articulates the applicable legal requirements required to support a contested case hearing.<sup>4</sup> The BCW Comment did not assert any personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the Application. In fact, BCW’s Comment is devoid of any demonstration of compliance with Sections 55.201 (Requests for Reconsideration of Contested Case Hearing) and 55.205 (Request by Group or Association).<sup>5</sup> Because BCW failed to meet the requirements relating to demonstrate affected person status under statute and agency rules, BCW’s contested case hearing request should be denied.

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<sup>4</sup> Requiring all elements of a contested case hearing request be satisfied within 30 days of the RTC in compliance with Section 55.201 is consistent with the public participation changes following the passage of House Bill 801 in 1999. The Commission noted in its 1999 rule adoption that “these rules accomplish the goal of streamlining the hearing process and encouraging early public participation.” 24 *Texas Register* 9015, 9018 (October 15, 1999).

<sup>5</sup> Given the absence of hearing requestor information, Oxy is unable to apply the factors under Section 55.203 for determining an affected person. These factors include whether a reasonable relationship exists between the interest claimed and the activity regulated and the likely impact of the regulated activity on the health and safety of the person, and on the use of property of the person. Additionally, for an application filed after September 1, 2015, the commission may also consider the merits of the underlying application and supporting documentation, including whether the application meets the requirements for permit issuance. TWC Section 5.115(a-1). The ED responded to all timely comments received by BCW and made his preliminary decision that Oxy’s permit, if issued, meets all statutory and regulatory requirements. The absence of information to support its hearing request in combination with the ED’s decision that the application meets applicable law further supports the Commission’s denial of BCW’s hearing request.

## **Analysis of Referrable Issues**

Consistent with Section 55.209 (Processing Requests for Reconsideration and Contested Case Hearing), Oxy is addressing providing an analysis of the issues raised in BCW's comments. However, because BCW has not demonstrated it is an affected person as required under state law and agency rules, Oxy urges the commission to deny BCW's contested case hearing request and not refer this application to the State Office of Administrative Hearings (SOAH) for a contested case hearing per Texas Water Code Section 5.556. The Analysis below generally follows the issues in the same order as the Texas Commission on Environmental Quality Executive Director's (ED's) Response to Comments (RTC), which addressed BCW's comments.

### **1. Anti-backsliding and Proposed Increased Copper, Lead, Nickel, and Zinc Mass Concentration Limits (ED RTC Nos. 1, 2)**

Increasing the limits for copper, lead, nickel, and zinc at Outfall 001 does not violate anti-backsliding provisions. An exception to anti-backsliding for a permit condition based on a state standard is allowed under the federal Clean Water Act (CWA) where the permit change meets one of the exceptions listed at CWA Section 402(o)(2) and where the change will comply with the water quality standard and be consistent with any applicable effluent guideline per CWA Section 402(o)(3).<sup>6</sup> The proposed change would meet the anti-backsliding exception at Section 402(o)(2)(A), material and substantial alterations to the facility, which in this instance is: (1) an increase in production capacity for caustic/chlorine; and (2) a modification in how flow in the Outfall 001 wastewater system is managed. The increased limits for these metals, being based on Water Quality Based Effluent Limitations (WQBELs), demonstrate that water quality standards

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<sup>6</sup> U.S. Environmental Protection Agency NPDES Permit Writers' Manual, EPA-833-K-10-001, September 2010, Section 7.2, "Applying Anti-backsliding Requirements."

would be maintained and be consistent with antidegradation policy. The WQBEL limits for copper, lead, and nickel are more stringent than the limits that are based on the effluent guidelines at 40 CFR Section 415.62(b) that are applicable to the facility and therefore are consistent with the guidelines. There is no effluent guideline for zinc that is applicable to the facility. Appendix D of the fact sheet for the draft permit shows the comparison between the WQBELs and the effluent guideline technology-based limits.

If this issue is referred to SOAH, Applicant respectfully request that it be described as follows: “Whether the proposed water quality-based mass concentration limits for copper, lead, nickel, and zinc comply with the anti-backsliding exception established under CWA Section 402(o)(2)(A)?”

**2. Antidegradation Review and Effects on Human Health and Health of Ecosystems (ED RTC Nos. 3 and 5)**

TCEQ’s Water Quality Standards are designed to be protective of aquatic and terrestrial life and human health and welfare, and the draft permit was developed to comply with those standards. The ED determined that the effluent limitations in the proposed draft permit are set to maintain and protect the existing instream uses which in this case are minimal aquatic life use for the Phillips Ditch; high aquatic life use for the Santa Ana Bayou; and non-contact recreation and high aquatic life use for Segment No. 1005. The ED concluded that these uses will be protected if the Battleground facility is operated and maintained as required by the draft permit and regulations.

With regard to minimal aquatic life use for the Phillips Ditch, the ED’s Tier I antidegradation review of Oxy’s application preliminarily determined, based on information

available during the technical review, that existing water quality use will not be impaired by the permit if it is issued. Numerical and narrative criteria to protect existing uses will be maintained.

With regard to the high aquatic life use designation of Santa Ana Bayou and Houston Ship Channel/San Jacinto River Tidal, the ED's Tier II antidegradation review of Oxy's application preliminarily determined, based on information available during the technical review, that no significant degradation of water quality is expected in Santa Ana Bayou or Houston Ship Channel/San Jacinto River Tidal.

To the extent this issue is referred to SOAH, the Applicant respectfully requests that it be described as follows: "Whether the application and draft permit comply with TCEQ regulations at 30 TAC Section 307.5(b)(1) and (2)?"

**3. Anti-backsliding Policy and Proposed Increase in Daily Average Total Suspended Solids (ED RTC No. 4)**

Oxy is requesting an increase in the daily average flow limit for Outfall 001 from 2.15 MGD to 2.40 MGD. Production levels have increased from 1,585 tons per day (tpd) in the 2003 TPDES application to 1,662 tpd in the current 2019 application. While production and flow have increased, the total suspended solids (TSS) daily average limit has not changed in the permit since at least 1995.<sup>7</sup> Oxy is requesting an increase in the daily average limit for TSS for Outfall 001 from 448 pounds per day (lb/d) to 600 lb/d based on increased flow and production.

The Battleground Facility is subject to effluent limitations and guidelines (ELGs) at 40 CFR 415 Subpart F Chlor-Alkali. The specific ELGs at 40 CFR 415.62(b) for chlor-alkali

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<sup>7</sup> EPA NPDES permit no. TX008150 issued March 10, 1995.

diaphragm cells allow for a TSS mass discharge of 0.51 lb TSS per day per thousand-lb per day of production. Based on the current production level of 1,662 tpd (3,324 thousand-lb/d), the allocation is 1,695 lb/d TSS as a daily average. Oxy is requesting 600 lb/d, which is only 35% of the allocation.

Because the daily average TSS limit is based on effluent guidelines, an increase in a permit limit is subject to anti-backsliding regulations at 40 CFR 122.1(1)(2). The increase in the TSS limit meets the anti-backsliding exception at §122.44(1)(2)(i)(a), material and substantial alterations to the facility, in this case, an increase in the facility production levels upon which allowable TSS limits are based. There are no WQBELs or state technology-based effluent limits for TSS that are applicable to the facility.

To the extent this issue is referred to SOAH, the Applicant respectfully requests that it be described as follows: “Whether the proposed increase in daily average limit for total suspended solids complies with the anti-backsliding exception established under 40 CFR Section 122.44(1)(2)(i)(A)?”

#### **4. Applicability of Mercury Limit (ED RTC No. 6)**

Since 1974 when the facility began operating, the Battleground Facility has used the diaphragm cell process, rather than a mercury cell process, for manufacturing chlorine and sodium hydroxide (caustic). The diaphragm cell process does not use mercury and is not regulated for mercury by the best available technology (BAT) effluent limitations guidelines at 40 CFR Section 415.63(b). Accordingly, the Applicant respectfully requests that this issue not be referred to SOAH.



## **5. Status of Segment No. 1005 on CWA 303(d) List (ED RTC No. 7)**

As noted in the ED's RTC, Segment No. 1005 is listed for dioxin in edible tissue and polychlorinated biphenyl (PCBs) in edible tissue in Houston Ship Channel Tidal/San Jacinto River Tidal (Downstream I-10 to Morgan's Point). Oxy's application indicates trace amounts of chlorinated congeners of dioxins and furans which may be present in Outfall 001. Because the analytical data does not exceed 70 percent of the calculated daily average water quality-based effluent limitation, the proposed effluent discharge is not expected to add to the impairment for dioxin in edible tissue or PCBs in edible tissue. The ED additionally concluded, following Tier I and Tier II antidegradation reviews of receiving waters that existing water quality minimal aquatic life uses will not be impaired and high aquatic life uses will be maintained and protected.

To the extent this issue is referred to SOAH, the Applicant respectfully requests that it be described as follows: "Whether the application and draft permit comply with TCEQ regulations at 30 TAC Section 307.5(b)(1) and (2)?"

## **IV. Maximum Duration of Hearing**

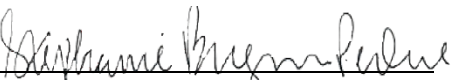
Should the Commission decide to refer this case to SOAH for a hearing, given the limited number and scope of issues Applicant believes may be appropriate in this case, the maximum expected duration of a hearing on this Application and draft permit should be no longer than six months after the first date of the preliminary hearing until the proposal for decision is issued.

**V. Conclusion**

For the reasons set forth above, Applicant respectfully requests that the Commission deny BCW's hearing request, not refer this matter for a contested case hearing, and approve Oxy's Application and issue amended TPDES Permit No. WQ0001539000.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This certifies that on 27<sup>th</sup> day of June, 2022, I served the above and foregoing *Oxy Vinyl LP's Response to Request for Contested Case Hearing* on counsel of record by the court's electronic filing service.

**FOR THE EXECUTIVE DIRECTOR**

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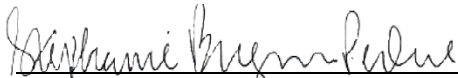
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