

**TCEQ DOCKET NO. 2022-1585-AIR
AIR QUALITY PERMIT NO. 41945**

APPLICATION BY	§	
BASF TOTALENERGIES	§	BEFORE THE
PETROCHEMICALS LLC	§	TEXAS COMMISSION ON
PORT ARTHUR, JEFFERSON COUNTY	§	ENVIRONMENTAL QUALITY

**APPLICANT’S RESPONSE TO PROTESTANT’S
CONTESTED CASE HEARING REQUEST**

**TO THE HONORABLE MEMBERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:**

BASF TotalEnergies Petrochemicals LLC (“*BTP*” or “*Applicant*”) respectfully submits this response to the contested case hearing request (*the “Request”*) that Mr. Hilton Kelley (“*Mr. Kelley*”) on behalf of Community In-Power and Development Association, Inc. (“*Protestant*” or “*CIDA*”) submitted to the Commissioners of the Texas Commission on Environmental Quality (“*TCEQ*” or “*Commission*”) regarding the amendment and renewal of Air Quality Permit Number 41945 (*the “Permit”*). The Request should be denied because Protestant as a group or association fails to identify any member with a personal justiciable interest affected by the application and fails to identify any disputed issues of fact or law. *See* 30 Tex. Admin. Code § 55.205(a); §§ 55.201(d)(2),(4). Because Protestant has not demonstrated “affected person” status, the Commission must deny the Request. Tex. Water Code § 5.556(c).

BACKGROUND

Pending before the Commission is an application submitted by BTP to amend and renew the Permit for its facility located at State Highway 366, Gate 99, at the intersection of Highway 366 and Highway 73, Port Arthur, Jefferson County, Texas (*the “Facility”*).

The purpose of this application is to authorize the continued operation of the Facility and incorporate several requested updates and changes to provisions in the Permit. In the Request CIDA does not ask for any specific changes to the Permit, but instead focuses on a generalized fear of noncompliance. Accordingly, this filing focuses on the claims raised in the Request and not the overall merits of the Permit application, which the Executive Director has already determined satisfies state and federal requirements.

PROCEDURAL HISTORY

TCEQ received the Permit application on April 28, 2021, and declared it administratively complete on May 5, 2021. The Notice of Receipt and Intent to Obtain an Air Quality Permit for this Permit application was published in English on May 12, 2021, in the *Port Arthur News* and in Spanish on May 16, 2021, in *El Perico*. The Notice of Application and Preliminary Decision for an Air Quality Permit (second public notice) was published in English on March 23, 2022, in the *Port Arthur News* and in Spanish on March 20, 2022, in *El Perico*.

On June 7, 2021, Protestant submitted a letter that included public comment and a contested case hearing request. The Executive Director responded to those comments on June 1, 2022 in the Executive Director’s Response to Public Comment enclosed with the Decision of Executive Director. In that Response, the Executive Director outlined the substantive requirements for requesting a contested case hearing and specified July 1, 2022 as the deadline for submitting such

requests. Protestant did not subsequently submit a renewed or updated request, or otherwise address the Executive Director's Response to its comments.

APPLICABLE LAW

“The [C]ommission may not grant a request for a contested case hearing unless the [C]ommission determines that the request was filed by an affected person . . .” Tex. Water Code § 5.556(c). Members of the general public who request a contested case hearing must establish their status as “affected persons” under TCEQ’s rules by identifying in their hearing request a:

personal justiciable interest affected by the application, including a brief, but specific, written statement explaining in plain language the Protestant’s location and distance relative to the proposed facility or activity that is the subject of the application and how and why the Protestant 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.

30 Tex. Admin. Code § 55.201(d)(2); *see also id.* § 55.203(a); *accord* Tex. Water Code § 5.115(a).

Generalized pollution and contamination concerns are “interests common to the members of the general public.” *See Sierra Club v. Texas Comm'n on Env'tl. Quality*, 455 S.W.3d 214, 225 (Tex. App.—Austin 2014) (affirming Commission decision that requesters were not affected persons because “general contamination” concerns are “interests common to the members of the general public”).

Further, a group or association may request a contested case hearing only if the group or association meets all of the following requirements:

- (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 Tex. Admin. Code § 55.205(a). As further explained below, Protestant fails to demonstrate that Mr. Kelley or any other member of CIDA is an affected person and so the Request must be denied.

DISCUSSION

A. CIDA Does Not Identify A Member Who Is An Affected Person

Protestant has not established that one or more of its members would otherwise have standing to request a hearing in their own right. Members of the general public who request a contested case hearing must establish their status as “affected persons” under TCEQ’s rules by briefly and specifically stating: (1) their location and distance relative to the proposed facility or activity; and (2) how and why they will be adversely affected by the proposed activity “in a manner not common to members of the general public.” 30 Tex. Admin. Code § 55.201(d)(2).

1. The Request Fails to Provide Location and Distance from the Facility

Mr. Kelley, who filed the Request on behalf of Protestant, provides as CIDA’s address, 600 Austin Avenue, Port Arthur, Texas 77640. Mr. Kelley does not specify whether that is also the address of his personal residence or its distance from the Facility. A Google search conducted by the Applicant indicates that address is located approximately 6.5 miles from the Facility. The Request also claims that Mr. Kelley works within a one-mile radius of the Facility, but does not disclose his employer or a position other than Executive Director of CIDA. Mr. Kelley states that he surveys an area in the vicinity of the Facility on a weekly basis. Protestant further identifies a restaurant, Larry’s French Market (“*Restaurant*”),¹ that Mr. Kelley and other unnamed area residents allegedly frequent. Although an address for the Restaurant is not provided in the Request, a Google search conducted by the Applicant identifies a restaurant with this name located

¹ Larry’s French Market is located at 3701 Pure Atlantic Road, Groves, Texas 77619. It is unclear whether Protestant represents Larry’s French Market or whether Larry’s French Market is a member of CIDA. No contact information was provided for Larry’s French Market.

approximately 0.5 miles from the Facility. The Request also refers to an unnamed church and school that are allegedly located within one mile of the Facility, but does not identify any specific individuals associated with the church or school nor whether the church, school, or any of their employees, attendees, or other affiliates are members of CIDA.

2. The Request Fails to Identify an Affected Party

Protestant does not name any members of CIDA nor describe how or why Mr. Kelley, any other members of Protestant's organization, the Restaurant or its diners, or other unidentified residents will be adversely affected by the activities authorized by the proposed Permit in a manner not common to members of the general public. Rather, Protestant expresses only generalized concerns, not personal harms.

Protestant expresses fears that "our health and the air quality in our environment will further deteriorate due to the lack of current lack of [*sic*] adherence to emissions limits from [the Facility]." Request at 1. Protestant goes on to state that the Facility emissions will "put the community health and livelihood in jeopardy and it will also diminish the quality of our air, our property value, our ability to enjoy our properties, 'Memorial park,' and disrupt the church and school, which are all located within the one-mile radius of the [Facility]."² *Id.* Finally, Protestant expresses fears that allowing the Facility "to continue emitting the abovementioned toxins and compounds into our air, will have an adverse effect on my personal health and the health of the members and associates of my organization." *Id.* at 2.³

² Protestant does not identify the name or address for 'Memorial park' nor the church or school; BASF could not confirm statements that these facilities are within one mile from the Facility.

³ Protestant also observes that the Facility was assessed fines for noncompliance during years 2019-2021. No personal justiciable interest arises from enforcement by the TCEQ against another entity. Further, wholly past allegations or violations do not carry risk of present injury of any kind, much less any risk associated with the future activities taken under the proposed Permit. As the Executive Director explains in the Response to Protestant's Comments, robust conditions have been included in the proposed Permit to ensure the Facility can demonstrate compliance.

Apart from these generalized fears and concerns, Protestant does not identify any specific or justiciable impact to Mr. Kelley, any other members of Protestant's organization, the Restaurant, or the unnamed residents that is not otherwise common to members of the public. Whether the geographic area described in the Request is 0.5, 1.0 or 6.5 miles in radius, potential allegedly affected persons would include communities comprising thousands to tens of thousands of individuals, all of whom could have the fears and concerns Protestant identifies in common. *Sierra Club*, 455 S.W.3d at 225.

The Request also fails to meet the remaining criteria for demonstrating group standing. Protestant does not address or establish that the interests CIDA seeks to protect in connection with the Request are germane to the organization's purpose. Protestant also fails to establish that neither the claim asserted nor the relief requested will require participation of individual members in the case. The Commission must deny a request by a group or association unless it "substantially complies" with the informational requirements for requesting a contested case hearing. 30 Tex. Admin. Code § 55.201(d). Protestant's failure to demonstrate a personal justiciable interest and meet the other requirements for party status in a contested case hearing warrant denial of the Request.

B. There Are No Disputed Issues Of Fact Or Law, Nor Are Any Of The Issues Raised Material Or Relevant To Issuance Of The Permit

Even if Protestant could demonstrate affected party status, the Request fails to "list all relevant and material disputed issues of fact that were raised . . . during the public comment period and that are the basis of [its] hearing request." 30 Tex. Admin. Code § 55.201(d)(4)(B). Nor does the Request "specify any of the [E]xecutive [D]irector's responses to the Protestant's comments that the Protestant disputes, the factual basis of the dispute, and . . . any disputed issues of law." *Id.*

This lack of required information is due to the fact that on June 7, 2021, Protestant submitted with its public comment a substantively deficient hearing request that Protestant did not correct or supplement by the July 1, 2022 deadline specified in the Executive Director’s Response to Public Comment. Because Protestant did not update its request for a contested case to address the Executive Director’s response, the Request continues to make allegations based on the incorrect assumption that the Facility will not be required to comply with applicable standards. As the Executive Director stated and Protestant did not dispute, “[s]pecial Conditions have been included as part of the proposed permit to ensure the Applicant can demonstrate compliance with the emission limitations set forth in the permit.” Response to Comments at 5. If Protestant disputes this fact, it had a duty to state that dispute prior to the Executive Director’s deadline.

Because the Request fails to raise any disputed issues of fact or law, it should be denied. 30 Tex. Admin. Code § 55.201(d)(4)(B); *see also* Tex. Water. Code § 5.556(d)(1) (“The [C]ommission may *not* refer an issue to the State Office of Administrative Hearings for a hearing unless the [C]ommission determines that the issue . . . involves a disputed question of fact.”) (emphasis added).

C. The Executive Director Concluded That The Permit Meets Applicable State And Federal Requirements

In deciding whether to grant a request for a contested case hearing, the Commission may consider the analysis and opinions of the Executive Director. 30 Tex. Admin. Code § 55.203(d)(2). The Executive Director conducted an extensive technical review of the application, from which the Executive Director concluded that the proposed Permit is protective and meets all requirements for permit issuance.

Protestant's concerns were considered and taken seriously both by the Executive Director and the Applicant.⁴ The Executive Director responded in detail to Protestant's comments in its Response to Comments, explaining the multi-part modeling the Applicant conducted using an EPA-approved air dispersion modeling program. The Executive Director completed a detailed evaluation of that modeling as part of the application review process. Response to Comments at 3-4. Based on that evaluation, the Executive Director concluded that "it is not expected that existing health conditions will worsen, or that there will be adverse health effects on the general public, sensitive subgroups, or the public welfare and the environment as a result of proposed emission rates associated with this project." Response to Comments at 4. Accordingly, the Executive Director determined that no changes were required to the proposed Permit in response to comments received from Protestant and affirmed its conclusion that the proposed Permit is protective of human health and the environment.

D. The Maximum Expected Duration Of A Hearing

Although BTP recommends denial of the Request, should the Commission disagree, Applicant estimates that the maximum expected duration of a hearing on this application would be six months from the first date of the preliminary hearing until the proposal for decision is issued.

PRAYER FOR RELIEF

Protestant failed to submit a hearing request that complies with TCEQ rules and provides information sufficient to demonstrate that Protestant is an affected person. For the foregoing reasons, BTP respectfully requests that the Commission: (1) find that the Request fails to comply

⁴ The Applicant extended invitations and met in person with Mr. Kelley on February 7, 2023, and on March 20, 2023, to discuss CIDA's concerns. Following those meetings BTP provided Mr. Kelley with contact information for multiple BTP employees and encouraged CIDA to share concerns or complaints directly with BTP going forward.

with the Commission's rules for contested case hearing requests; (2) deny the Request for a contested case hearing; and (3) approve BTP's application to amend and renew Permit No. 41945.

Respectfully submitted,



Laura L. LaValle, State Bar No. 00789058
Graham H. Pough, State Bar No. 24133510

BEVERIDGE & DIAMOND, P.C.

400 W. 15th St., Suite 1410
Austin, Texas 78701-1648
t: 512.391.8000
f: 512.391.8099

e : llavalle@bdlaw.com
e : gpough@bdlaw.com

ATTORNEYS FOR APPLICANT
BASF TOTALENERGIES PETROCHEMICALS
LLC

CERTIFICATE OF SERVICE

I certify that, on July 24, 2023, a true and correct copy of the foregoing response was served on the following:

FOR THE EXECUTIVE DIRECTOR:

Abigail Adkins, 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
Via Electronic Mail to: abigail.adkins@tceq.texas.gov

Harry Xue, P.E., Technical Staff
Texas Commission on Environmental
Quality
Air Permits Division, MC-163
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-5220 Fax: (512) 239-7815
Via Electronic Mail to: harry.xue@tceq.texas.gov

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

FOR PUBLIC INTEREST COUNSEL:

Garrett T. Arthur, Public Interest Counsel
Texas Commission on Environmental Quality
Office of Public Interest Counsel, MC-103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-6363 Fax: (512) 239-6377
Via Electronic Mail to: garrett.arthur@tceq.texas.gov

FOR ALTERNATIVE DISPUTE RESOLUTION:

Kyle Lucas
Texas Commission on Environmental Quality
Alternative Dispute Resolution, MC-222
P.O. Box 13087

Austin, Texas 78711-3087
Tel: (512) 239-0687 Fax: (512) 239-4015
Via Electronic Mail to: kyle.lucas@tceq.texas.gov

FOR THE CHIEF CLERK:

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

REQUESTER(S) / INTERESTED PERSON(S):

Hilton Kelley
Community In-Power and Development Association, Inc.
600 Austin Avenue
Port Arthur, Texas 77640
Via Electronic Mail to: hilton.kelley@cidainc.org

By:

BEVERIDGE & DIAMOND, P.C.
400 W. 15th St., Suite 1410
Austin, Texas 78701-1648
t: 512.391.8000
f: 512.391.8099

e : llavalle@bdlaw.com
e : gpough@bdlaw.com



Laura L. LaValle, State Bar No. 00789058
Graham H. Pough, State Bar No. 24133510

ATTORNEYS FOR APPLICANT
BASF TOTALENERGIES PETROCHEMICALS LLC