

Jon Niermann, *Chairman*
Emily Lindley, *Commissioner*
Bobby Janecka, *Commissioner*
Kelly Keel, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

July 24, 2023

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

RE: **BASF TOTALENERGIES PETROCHEMICALS LLC (APPLICANT)**
TCEQ DOCKET NO. 2022-1585-AIR

Dear Ms. Gharis:

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

Sincerely,

A handwritten signature in cursive script that reads "Jessica M. Anderson".

Jessica M. Anderson, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2022-1585-AIR

APPLICATION BY BASF	§	BEFORE THE
TOTALENERGIES	§	
PETROCHEMICALS LLC FOR A	§	TEXAS COMMISSION ON
NEW SOURCE REVIEW	§	
AUTHORIZATION FOR	§	ENVIRONMENTAL QUALITY
PERMIT NO. 41945	§	

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

To the Members of the Texas Commission on Environmental Quality:

The Office of Public Interest Counsel (OPIC) at the Texas Commission on Environmental Quality (TCEQ) files this Response to Request for Hearing on the application in the above-captioned matter and respectfully submits the following.

I. INTRODUCTION

A. Summary of Position

Before the Commission is an application by BASF TotalEnergies Petrochemicals LLC (BASF or Applicant) for a New Source Review Authorization to amend and renew Permit No. 41945 under the Texas Clean Air Act (TCAA). The Commission received a timely combined comment and hearing request from Hilton Kelley on behalf of Community In-Power and Development Association Inc. (CIDA). For the reasons stated herein, OPIC respectfully recommends the Commission find that CIDA is not an affected person in this matter, and further recommends denial of CIDA's hearing request.

B. Description of Application and Facility

BASF applied for a New Source Review Authorization pursuant to TCAA § 382.0518 to amend and renew Permit No. 41945 and continue operation of the BASF Fina NAFTA Region Olefins Complex. The plant is located at State Highway 366, Gate 99, which is at the intersection of Highway 366 and Highway 73 in Port Arthur, Jefferson County.

Contaminants authorized under this permit include carbon monoxide, nitrogen oxides, sulfur dioxide, hazardous air pollutants, organic compounds, and particulate matter with diameters of 10 microns or less and 2.5 microns or less.

C. Procedural Background

BASF's application was received on April 28, 2021, and declared administratively complete on May 5, 2021. The Notice of Receipt of Applications and Intent to Obtain an Air Quality Permit (NORI) was published on May 12, 2021, in English in the *Port Arthur News*, and on May 16, 2021, in Spanish in *El Perico*. The Notice of Application and Preliminary Decision for an Air Quality Permit (NAPD) was published on March 23, 2022, in English in the *Port Arthur News*, and on March 20, 2022, in Spanish in *El Perico*. The public comment period for this application closed on April 22, 2022. The Chief Clerk mailed the Executive Director's (ED) Decision and Response to Comments (RTC) on June 1, 2022. The deadline for filing requests for a contested case hearing or reconsideration of the ED's decision on the application was July 1, 2022.

II. APPLICABLE LAW

The Application was filed after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709. Tex. S.B. 709, 84th Leg., R.S. (2015). Under 30 Texas Administrative Code (TAC) § 55.21(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue raised solely in a public comment which has been withdrawn, and, for applications filed on or after September 1, 2015, must be based only on the affected person's timely comments.

Section 55.201(d) states that 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;
- (2) identify the requestor'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;
- (3) request a contested case hearing;
- (4) 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 ED'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.

30 TAC § 55.201(d).

Under 30 TAC § 55.203(a), 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. An interest common to members of the general public does not qualify as a personal justiciable interest. Relevant factors to be 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;
- (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.

30 TAC § 55.203(c).

Under § 55.203(d), to determine whether a person is an affected person for the purpose of granting a hearing request for an application filed on or after September 1, 2015, the Commission may also consider the following:

- (1) the merits of the underlying application and supporting documentation in the 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.

30 TAC § 55.203(d).

Under 30 TAC § 55.205(b), a hearing request by a group or association may not be granted unless all of the following requirements are met:

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

Under 30 TAC § 55.211(c)(2)(A)(ii), for an application filed on or after September 1, 2015, the Commission must grant a hearing request made by an affected person if the request raises disputed issues of fact that were raised by the affected person during the comment period, that were not withdrawn by filing a withdrawal letter with the Chief Clerk prior to the filing of the ED's RTC, and that are relevant and material to the Commission's decision on the application.

Under § 55.211(c)(2)(B)-(D), the hearing request, to be granted, must also be timely filed with the Chief Clerk, pursuant to a right to hearing authorized by law, and comply with the requirements of § 55.201.

III. ANALYSIS OF HEARING REQUEST

A. Whether the requestor is an affected person

CIDA

Hilton Kelley, acting on behalf of CIDA, submitted a timely combined comment and hearing request on June 7, 2021. In order for an association's hearing request to be granted, the request must identify one or more members, by name and physical address, that would otherwise have standing to request a hearing in their own right. 30 TAC § 55.205(b)(2). Mr. Kelley's request identified himself as an affected member and gave his address as 600 Austin Avenue Port Arthur, which, according to the map created by ED staff, is 6.38 miles from the Facility. Mr. Kelley also explained that he works within one mile of the Facility, surveys the area on a weekly basis, and frequents a nearby restaurant.

CIDA raised concerns about the Applicant's history of noncompliance, adverse effects on human and animal health, inadequate protection of air quality, and potential negative impacts on community property values. CIDA stated that it is a non-profit organization founded to empower low-income communities to take action against potential environmental pollution. OPIC finds that CIDA's stated purpose is germane to the interests it seeks to protect.

While the concerns Mr. Kelley raised on behalf of CIDA include concerns that are protected by the law under which this Application will be considered, a reasonable relationship must exist between those interests and the regulation of air contaminants under the proposed permit. *See* 30 TAC § 55.203(c)(3). Mr. Kelley's provided address is 6.38 miles from the Facility. Because of the intervening distance between Mr. Kelley's address and the Facility, OPIC cannot conclude that its operations are likely to affect Mr. Kelley in a way that is not common to members of the general public. *See* 30 TAC § 55.203(a).

Additionally, Mr. Kelley stated that he engages in activities that take place near the Facility which could implicate economic or recreational interests. However, his description of activities lacks the specificity necessary for OPIC to ascertain exactly what the interests he seeks to protect are and how they may be affected by the Facility's operation. OPIC does not have sufficient information to assess whether a reasonable relationship exists between the Facility and Mr. Kelley's interests or the likely impact of the Facility's operations on Mr. Kelley's health and safety or use of natural resources. *See* 30 TAC § 55.203(c)(3), (4), (5). Finally, OPIC is unable to differentiate how Mr. Kelley would be affected in a way not common to members of the general public. *See* 30 TAC § 55.203(a).

Therefore, OPIC concludes that CIDA has not offered a member who would have standing to request a hearing in their own right. Consequently, OPIC finds that CIDA has not shown it possesses a personal justiciable interest in this matter and does not qualify as an affected person.

B. Which issues raised in the hearing request are disputed

CIDA raised the following disputed issues:

1. Whether the Applicant's history of noncompliance may lead to future violations;
2. Whether the renewal of this permit will adversely affect human and animal health;
3. Whether the permit is adequately protective of air quality; and
4. Whether the renewal of this permit will have a detrimental effect on property values.

C. Whether the dispute involves questions of fact or of law

If the Commission considers an issue to be one of fact, rather than one of law or policy, it is appropriate for referral to hearing if it meets all other applicable requirements. All issues raised by CIDA are issues of fact.

D. Whether the issues were raised during the public comment period

Issues 1-4 in Section III.B. were specifically raised by CIDA during the public comment period.

E. Whether the hearing request is based on issues raised solely in a withdrawn public comment

No public comments were withdrawn in this matter; therefore, the hearing request is not based on issues raised in withdrawn public comments.

F. Whether the issues are relevant and material to the decision on the application

The hearing request raises some issues that are relevant and material to the Commission's decision under the requirements of 30 TAC §§ 55.201(d)(4)(B)

and 55.211(c)(2)(A)(ii), and some that are not. To refer an issue to the State Office of Administrative Hearings (SOAH), the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny the permit. Relevant and material issues are those governed by the substantive law under which the permit is to be issued. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Past Noncompliance

The requestor has stated concerns regarding BASF's previous history of noncompliance with environmental regulations. When making a decision on the issuance of a permit, the Commission is required to consider an entity's past compliance with applicable environmental rules and statutes through an evaluation of that entity's compliance history. 30 TAC § 60.1(a)(1)(A); 30 TAC § 60.3(a)(1)(A). Additionally, to address concerns with compliance history, the TCEQ may impose certain permit conditions or provisions. 30 TAC § 60.3(a)(2). Because compliance history must be considered in the decision to issue a permit and whether special conditions should be included in the permit, Issue No. 1 is relevant and material to the Commission's decision regarding this Application.

Human and Animal Health, and Air Quality

Under the Texas Clean Air Act, the Commission may issue this permit only if it finds no indication that the emissions from the Facility will contravene the intent of the TCAA, including protection of the public's health and physical property. TCAA § 382.0518(b)(2).

Further, the purpose of the TCAA is to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property. TCAA § 382.002(a). Additionally, Applicant's proposed emissions must meet the secondary National Ambient Air Quality Standards (NAAQS), which provide public welfare protection, including protection against damage to animals, crops, vegetation, and buildings. *See* ED's RTC, p. 2, Resp. 1.

Therefore, Issue Nos. 2 and 3 regarding human health and air quality are relevant and material to the Commission's decision regarding this Application.

Property Value

The concern raised regarding adverse effects on property values falls outside of TCEQ's jurisdiction when determining whether to grant an air permit application. Issue No. 4 is therefore not relevant and material to the Commission's decision regarding this Application.

G. Maximum expected duration for the contested case hearing

Commission rule 30 TAC § 50.115(d) requires that any Commission order referring a case to SOAH specify the maximum expected duration of the hearing by stating a date by which the judge is expected to issue a proposal for decision. The rule further provides that, for applications filed on or after September 1, 2015, the administrative law judge must conclude the hearing and provide a proposal for decision by the 180th day after the first day of the preliminary hearing, or a date specified by the Commission, whichever is earlier. 30 TAC

§ 50.115(d)(2). To assist the Commission in setting a date by which the judge is expected to issue a proposal for decision, and as required by 30 TAC § 55.209(e)(7), OPIC estimates that the maximum expected duration of a hearing on this Application would be 180 days from the first date of the preliminary hearing until the proposal for decision is issued.

IV. CONCLUSION

Having found that CIDA does not qualify as an affected person in this matter, OPIC respectfully recommends the Commission deny CIDA's pending hearing request. However, if the Commission disagrees and refers this matter to SOAH for a contested case hearing, OPIC recommends a hearing duration of 180 days on Issue Nos. 1-3 contained in § III.B.

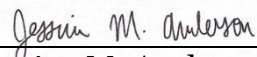
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2023, the original of the Office of Public Interest Counsel's Response to Request 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 Inter-Agency Mail, electronic mail, or by deposit in the U.S. Mail.



Jessica M. Anderson

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TCEQ DOCKET NO. 2022-1585-AIR

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