

Jon Niermann, *Chairman*
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Kelly Keel, *Interim Executive Director*



Garrett T. Arthur, *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

December 8, 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: **IN THE MATTER OF THE APPLICATION BY WEST GIN, LLC FOR
RENEWAL OF AIR QUALITY PERMIT NO. 21589
TCEQ DOCKET NO. 2023-0545-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 "Josiah Mercer".

Josiah T. Mercer, Attorney
Assistant Public Interest Counsel

cc: Mailing List

DOCKET NO. 2023-0545-AIR

APPLICATION BY WEST GIN, LLC	§	BEFORE THE
FOR RENEWAL OF AIR QUALITY	§	TEXAS COMMISSION ON
PERMIT NUMBER 21589	§	ENVIRONMENTAL QUALITY

**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 (Commission or TCEQ) files this response to the request for hearing in the above-captioned matter.

I. Introduction

A. Summary of Position

Before the Commission is an application by West Gin, LLC (Applicant or West Gin) for renewal of Air Quality Permit No. 21589 (the Application). OPIC notes that the TCEQ Chief Clerk's office received one timely hearing request from Brownfield Farmers Cooperative Station (Brownfield Coop). For the reasons stated herein, OPIC is compelled to recommend that the Commission deny the request because no right to a hearing exists for this permit renewal as a matter of law.

B. Description of Application and Facility

West Gin applied to the TCEQ for renewal of a New Source Review Authorization under Texas Clean Air Act (TCAA) § 382.0518. If approved, this would authorize the continued operation of an existing cotton gin located at

1000 West Hill Street, Brownfield, Terry County (the Facility), that emits air contaminants. Contaminants authorized under this permit include carbon monoxide, nitrogen oxides, organic compounds, sulfur dioxide, and particulate matter including particulate matter with diameters of 10 microns or less and 2.5 microns or less. The renewal makes no changes to the amount, nature, or type of contaminants that are currently permitted.

C. Procedural Background

This Application is for renewal of Air Quality Permit No. 21589—which was last renewed in 2012. The Application was received on May 3, 2022, and declared administratively complete on May 12, 2022. The Notice of Receipt and Intent to Obtain an Air Quality Permit for this Application was published in English on June 2, 2022, in the *Brownfield News*. The public comment period ended on June 17, 2022. The Chief Clerk mailed the Executive Director’s (ED) Decision and Response to Comments on November 8, 2022. The deadline for filing hearing requests and requests for reconsideration of the ED’s decision was December 8, 2022. The Commission received one timely request for a contested case hearing from Brownfield Coop and no requests for reconsideration.

II. Applicable Law

This application was filed on or after September 1, 2015, and is therefore subject to the procedural rules adopted pursuant to Senate Bill 709.¹ Under Title 30, Texas Administrative Code (TAC) § 55.201(c), a hearing request by an affected person must be in writing, must be timely filed, may not be based on an issue

¹ Tex. S.B. 709, 84th Leg., R.S. (2015).

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 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;
- (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.²

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

² 30 TAC § 55.201(d).

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.³

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.⁴

³ 30 TAC § 55.203(c).

⁴ 30 TAC § 55.203(d).

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 a Right to a Hearing Exists

The Commission must first decide whether the right to a hearing exists for this Application. Under the TCAA, the Commission may only hold a hearing on a permit renewal that would increase the amount of permitted emissions or allow emission of an air contaminant not previously emitted.⁵ This Application and proposed permit would not authorize the Applicant to increase the quantity of emissions or to emit any air contaminant not already permitted.

However, the TCAA permits the Commission to hold a hearing on a no-increase permit renewal if the Commission determines that the application involves a facility for which the applicant's compliance history is classified as

⁵ TCAA § 382.056(g).

“unsatisfactory” under Texas Water Code (TWC) § 5.753 and 5.754.⁶ The rules adopted under these sections of the TWC state that an “unsatisfactory” compliance classification involves 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.⁷ Despite the two fires that occurred in 2018 and 2021, West Gin has a “0.00” compliance history rating according to the TCEQ compliance history database. For reference, a rating of less than 0.1 is considered “high,” 0.1-55 is “satisfactory,” and greater than 55 is “unsatisfactory.”⁸ Given that the Applicant’s rating is as far from “unsatisfactory” as it can be, OPIC is compelled to find that West Gin’s compliance history does not trigger the compliance history exception contained in TCAA § 382.056(o).

Based on OPIC’s review of the Application, we first find that this renewal would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted. Second, we find that Applicant’s compliance history does not trigger an exception to the hearing prohibition. Therefore, TCAA § 382.056(g) instructs OPIC that no right to a hearing exists for this renewal as a matter of law. For this reason, OPIC is statutorily compelled to recommend that the Commission find that there is no right to a contested case hearing in this matter. However, if the Commission

⁶ TCAA § 382.056(o).

⁷ See 30 TAC § 55.201(i)(3)(D), 55.211(d)(2).

⁸ 30 TAC § 60.2.

decides to consider whether the requestor is an affected person who has raised relevant and material issues, OPIC offers the following additional analysis.

B. Whether the Requestor is an Affected Person

The Commission received only one timely hearing request in this matter. Brownfield Coop submitted timely comments and a hearing request through its general manager, Suzy Davis. Brownfield Coop is an agricultural retail store that is across the street from the Facility—within 200 feet. To be granted a contested case hearing, a requestor must show that they qualify as an “affected person.” To be granted this status, the requestor must show that they have a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application; and they must distinguish that interest from those common to the general public.⁹

In its comment and hearing request, Brownfield Coop raises concerns about the Facility’s continued effect on air quality, the Facility’s negative impact on business, and the Facility’s potential to damage Brownfield Coop property—as well as employee and customer property. Brownfield Coop claims that the fires that occurred at the Facility in 2018 and 2021 severely impacted business—causing them to evacuate and close for several days—and threatened Brownfield Coop’s bulk fuel, oil, chemical, and seed storage. These concerns are echoed by Joshua O’Briant—an employee of Brownfield Coop—in his individual comments. Additionally, Brownfield Coop complains that the dust and lint released by the Facility during normal operation causes property damage, creates health

⁹ See 30 TAC § 55.203(a).

concerns, and impacts business. These concerns are related to an interest that is protected by the law under which this Application will be considered.¹⁰ Further, as Brownfield Coop is close to the proposed Facility, a reasonable relationship exists between those interests and the Applicant's regulated activity—a relevant factor under 30 TAC § 55.201(c)(3).

Brownfield Coop's proximity, in combination with its stated interests, demonstrates that it is likely to be affected in a way not common to members of the general public, and thus possesses a personal justiciable interest in this matter. Therefore, OPIC concludes that Brownfield Coop would qualify as an affected person.

C. Which Issues Raised in the Hearing Requests Are Disputed

The affected person discussed above raised the following issues:

1. Whether continued operation of the proposed Facility would negatively impact air quality, property, and human health.
2. Whether the Applicant's compliance history should preclude them from being allowed to continue operating the Facility.

D. 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. The issues raised here are issues of fact.

E. Whether the Issues Were Raised During the Public Comment Period

All issues were specifically raised by a requestor who qualifies as affected person during the public comment period.

¹⁰ See 30 TAC § 55.203(c)(1).

F. Whether the Hearing Requests are 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 comments.

G. Whether the Issues are Relevant and Material to the Decision on the Application

The affected person's hearing request raises 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). To refer an issue to SOAH, the Commission must find that the issue is relevant and material to the Commission's decision to issue or deny this permit. Relevant and material issues are those governed by the substantive law under which this permit is to be issued.¹¹

Air Quality, Property, and Human Health

Brownfield Coop raises concerns in their timely filed comments related to the effect of the Facility on air quality, human health, and the property of the Coop, their employees, and their customers. Brownfield Coop claims that during normal operation they are adversely affected by excessive dust, lint, and smoke that is produced by the Facility. Employees run an air purifier indoors and are concerned that these air contaminants could negatively affect human health. During ginning season—vehicles, equipment, inventory, and other nearby property are consistently covered in dust and lint. This causes damage to Coop property as well as the property of their employees and customers. Brownfield

¹¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-51 (1986).

Coop also comments extensively on the negative impact that two previous fires at the Facility—in 2018 and 2021—had on business. They claim that they had to evacuate employees and customers and close the store on both occasions. They also opine about how close these fires came to igniting Brownfield Coop’s large quantities of gasoline, diesel, propane, kerosene, oil, and other highly flammable and potentially explosive chemicals. Before the Commission can grant the Application, they must find that emissions from the Facility will be protective of the public’s health and physical property.¹² Therefore, Issue No. 1 would be relevant and material to the Commission’s decision on the Application.

Compliance History

In their timely filed comments, Brownfield Coop also raises the issue of West Gin’s compliance history—particularly as it relates to the fires that occurred in 2018 and 2021. The Commission must consider West Gin’s compliance history when determining whether to grant the application for a permit.¹³ Therefore, Issue No. 2—West Gin’s compliance history—would be relevant and material to the Commission’s decision on this Application.

H. 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,

¹² TCAA § 382.0518(b)(2).

¹³ See TWC § 5.754(i).

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.¹⁴ 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

Under the Texas Clean Air Act, the Commission is prohibited from holding a hearing on a permit renewal 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 unless there is a compliance history exception.¹⁵ Based on OPIC's review of the available record and the official compliance history rating, we find that West Gin's Application is a no-increase permit renewal and does not meet the compliance history exception. Consequently, TCAA § 382.056(g) instructs us that no right to a hearing exists in this case as a matter of law. Therefore, OPIC respectfully recommends the Commission deny the hearing request.

However, if the Commission decides to consider affectedness and referable issues, OPIC finds that Brownfield Coop would qualify as an affected person.

¹⁴ 30 TAC § 50.115(d)(2).

¹⁵ TCAA § 382.056(g).

If a hearing is granted, OPIC respectfully recommends the relevant and material issues listed above in Section III.C. be referred to SOAH for a contested case hearing.

Respectfully submitted,

Garrett T. Arthur
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By: 
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CERTIFICATE OF SERVICE

I hereby certify that December 8, 2023, the original 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 on all persons listed on the attached mailing list via electronic mail, and/or by deposit in the U.S. Mail.


Josiah T. Mercer

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