

TCEQ DOCKET NO. 2023-1271-AIR

APPLICATION BY	§	BEFORE THE TEXAS COMMISSION
OXBOW CALCINING LLC FOR	§	
RENEWAL TO STATE AIR	§	ON
QUALITY PERMIT NO. 45622	§	
	§	ENVIRONMENTAL QUALITY

**OXBOW CALCINING LLC’S RESPONSE
TO REQUEST FOR CONTESTED CASE HEARING**

Oxbow Calcining LLC (“Oxbow”) submits this Response to the Request for Contested Case Hearing submitted in connection with the above-captioned permitting matter and would respectfully show the Texas Commission on Environmental Quality (the “Commission” or “TCEQ”) the following:

I. INTRODUCTION

On November 30, 2022, Oxbow filed a timely application to renew Air Quality Permit No. 45622 (the “Permit”), which will authorize the continued operation of its existing petroleum coke calcining plant located at 3901 Coke Dock Road in Port Arthur, Texas. Oxbow’s application seeks to renew the Permit as is, with no changes to any permit condition or limit, and is therefore considered a “no increase” renewal.

Public notice of Oxbow’s application was properly published in English on December 21, 2022 in the *Port Arthur News*, and in an alternative language, Spanish, on December 15, 2022 in *El Perico*. In response to the public notice, Port Arthur Community Action Network (“PA-CAN”) and Sierra Club (collectively, “Commenters”) submitted comments and a request for hearing on January 5, 2023. Because Oxbow’s renewal application does not seek authorization for and will not result in any new air contaminants or an increase in allowable emissions, there is no right to a contested case hearing on Oxbow’s renewal application. For the reasons set forth below, Oxbow

respectfully urges the Commission to deny the hearing request, adopt the Executive Director's Response to Public Comment ("RTC"), approve Oxbow's renewal application and renew the Permit.

II. THE HEARING REQUEST SHOULD BE DENIED

A. There is no Opportunity to Request a Contested Case Hearing on a "No Increase" Renewal Application

The opportunity to request a contested case hearing on an air permit application that will not result in an increase in allowable emissions is strictly limited. Section 382.056(g) of the Texas Clean Air Act ("TCAA") provides as follows:

The commission may not seek further public comment or hold a public hearing . . . in response to a request for a public hearing on . . . [a] renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted.¹

The Commission's own rules codify this statutory restriction² and expressly provide that there is no right to a contested case hearing for such a "no increase" renewal.

The hearing request should be denied because Oxbow's application seeks no changes to Permit No. 45622 nor the facilities authorized by the Permit. The Maximum Allowable Emission Rate Table ("MAERT") included with the renewed Permit confirms that there will not be an increase in emissions from the permitted facilities nor the emission of an air contaminant not previously emitted above currently authorized levels.³ The emission limits sought by the renewal application and reflected in the draft renewed permit are the same limits currently authorized by the Permit.⁴

¹ TEX. HEALTH & SAFETY CODE § 382.056(g).

² 30 TEX. ADMIN. CODE § 55.201(i)(3)(C).

³ RTC at 7-8.

⁴ Oxbow's application to renew Permit No. 45622 met the requirements of 30 TEX. ADMIN. CODE § 116.311 and qualified for the renewal certification option. The renewal certification process is intended to avoid unnecessarily

B. The Compliance History Exception Does Not Apply: Oxbow Maintains a Compliance History on the “High” Side of “Satisfactory”

Applicable law does provide a compliance history exception to the limitation on the right to a hearing. TEX. HEALTH & SAFETY CODE § 382.056(o) states that a right to a hearing *may* exist where the applicant’s compliance history “is classified as unsatisfactory according to commission standards.”⁵ The TCEQ has fully evaluated Oxbow’s history of compliance with environmental regulations. That review, conducted under Chapter 60 of TCEQ’s rules, shows that Oxbow is not classified as “unsatisfactory” according to Commission rules.⁶ Accordingly, TEX. HEALTH & SAFETY CODE § 382.056(o) does not create a right to a contested case hearing on Oxbow’s application for a “no increase” renewal of the Permit.

In fact, for the five-year compliance period prior to the date the application was submitted, Oxbow’s petroleum coke calcining plant had a compliance history rated as a rating of 1.26, and Oxbow itself was rated at 1.26.⁷ To be classified as “unsatisfactory,” a compliance history rating would have to exceed a rating of 55.00. Oxbow’s compliance history rating of 1.26 is on the “high” side of “satisfactory,”⁸ which is the category reserved for a regulated person or site that “generally complies with environmental regulations” under 30 TEX. ADMIN. CODE § 60.2.

burdening the agency’s limited resources. If the renewal certification option had not been selected, the process would have been materially the same because the full application would simply require duplicative forms indicating the same conclusion, *i.e.*, that this is a “no increase” renewal. Specifically, the technical section of the application would have included additional responses detailing how the project does not seek an increase in emissions and does not require an impacts analysis or disaster review. In addition, the “Unit Types – Emission Rates” section of the application would have been completed, identifying no changes in the current MAERT.

⁵ TEX. HEALTH & SAFETY CODE § 382.056(o). Section 55.201(i)(3)(c) of the TCEQ rules also states that the Commission “may hold a contested case hearing if the application involves a facility for which the applicant’s compliance history contains violations which are unresolved and which constitute a recurring pattern of egregious conduct which demonstrates a consistent disregard for the regulatory process.” When TCEQ adopted Section 55.201(i)(3)(c), the agency noted that this language was authorized by and intended to implement Section 382.056(o). 24 TEX. REG. 9015, 9034 (Oct. 15, 1999).

⁶ See RTC at 9-11.

⁷ *Id.* at 11.

⁸ Oxbow’s compliance history rating of 1.26 just barely falls outside of the best available “high” ranking category, reserved for those with a score of 0.10 or below.

The Commenters can only point to the existence of one formal enforcement matter within the compliance history period: an Agreed Order entered by TCEQ against Oxbow in August 2019. But that years-old Agreed Order reflected a settlement between Oxbow and TCEQ over disputed claims,⁹ included no findings of violation of any applicable permit or rule, and has been fully resolved.¹⁰ This fully resolved Agreed Order cannot support the application of the compliance history exception.

Furthermore, Commission rules state that "...[a] person or site classification itself shall not be a contested issue in a permitting or enforcement hearing."¹¹ And as the Executive Director noted in the RTC, the preamble to section 60.3(g) states "[a] person or site classification will be established outside the contested case process and not litigated and re-litigated in the context of permitting and enforcement actions."¹² The Executive Director specifically reviewed Oxbow's compliance history and noted that Oxbow is in compliance with the Permit.¹³ Because there are no unresolved matters in Oxbow's compliance history, the hearing request must be denied in accordance with the TCAA and TCEQ's rules.

⁹ The Agreed Order resolved claims that Oxbow had caused or contributed to several monitored hourly SO₂ levels that exceeded 75 parts per billion in 2018 based on a previously authorized mode of operation of its plant. That mode of operation was required to be ceased by the Agreed Order and is no longer authorized as of August 14, 2019. Moreover, the legal basis for such a claim by TCEQ is now in question. As the Executive Director explained in its Response to EPA's Objection to a minor revision of the Federal Operating Permit ("FOP") Permit No. O1493, the NAAQS are not applicable requirements under Title V and therefore do not require ongoing compliance. Executive Director's Response to EPA Objections to Permit No. O1493 at 2 (Feb. 3, 2023).

¹⁰ The Agreed Order was entered on August 14, 2019. Under the terms of the Agreed Order, Oxbow was to submit a written certification of compliance with the terms within 180 days. Oxbow did so on January 24, 2020. Letter from Michael Holtham, Oxbow Plant Manager, to TCEQ Order Compliance Team, dated January 24, 2020. TCEQ acknowledged that Oxbow had fully satisfied the requirements of the Agreed Order by letter dated July 22, 2020. Letter from Gilbert Angelle, TCEQ Enforcement Division, to Michael Holtham, Oxbow Plant Manager, dated July 22, 2020 ("...we conclude that your response has been satisfactory and no further action is necessary at this time with respect to this enforcement matter."). As TCEQ has confirmed multiple times, Oxbow has fully resolved the terms of the Agreed Order. RTC at 10 ("The Applicant has completed the requirements of the Agreed Order"); Executive Director's Response to EPA Objections to Permit No. O1493 at 2 (Feb. 3, 2023) ("Oxbow took the necessary corrective actions required by the 2019 Agreed Order and the order is now closed.").

¹¹ 30 TEX. ADMIN. CODE § 60.3(g).

¹² 27 TEX. REG. 7897 (2002).

¹³ RTC at 10.

C. Even if There Were an Opportunity for a Hearing, the Requestor is Not an Affected Person

Even if there were a right to a hearing on “no increase” renewal applications, only "affected persons," as defined by Texas law, are entitled to request a hearing. The Texas Legislature has narrowly defined the universe of "affected persons" who may, as a matter of right, be granted a contested case hearing.¹⁴ Only those persons who have a "personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing may require that a hearing be held."¹⁵ In the case of a renewal application that will not result in any emissions increase, it is difficult to envision how someone could demonstrate they are “affected” by the renewal of previously authorized emissions.

Because Oxbow is not seeking authorization for any increase in allowable emissions or the emission of an air contaminant not previously emitted, no person can show that it is likely to be adversely affected by Oxbow’s renewal application. The relevant standard for evaluating a requestor’s "affected person" status expressly provides that the Commission shall consider the "likely impact of the regulated activity" on the requestor.¹⁶ The activity to be regulated in this case—renewal of Oxbow’s Permit No. 45622—will have no different impact on the requestor because it will not result in an allowable emissions increase.

Moreover, all available monitoring data demonstrates that ambient air is in full compliance with the SO₂ NAAQS and there is no adverse impact on air quality near Oxbow’s plant or at the residence of the Commenters’ sole member, Mr. John Beard, which is located more than 2.5 miles from Oxbow’s plant. The current primary SO₂ NAAQS was established by EPA in 2010, and

¹⁴ TEX. WATER CODE § 5.115(a); 30 TEX. ADMIN. CODE § 55.203(a).

¹⁵ TEX. WATER CODE § 5.115(a).

¹⁶ 30 TEX. ADMIN. CODE § 55.203(c)(3) and (4).

retained in 2019, following a comprehensive review of relevant scientific literature.¹⁷ The primary SO₂ NAAQS is set at a level of 75 parts per billion (“ppb”), which is met when the 3-year average of the annual 99th percentile of daily maximum 1-hour average concentrations of SO₂ does not exceed 75 ppb. This standard reflects EPA’s judgment on the level needed to protect the general public, including sensitive subgroups, with an adequate margin of safety.¹⁸

For an accurate characterization of the SO₂ emissions from Oxbow’s plant, TCEQ established a new ambient air monitor in 2017 to fulfill EPA’s Data Requirements Rule,¹⁹ rather than the use of air dispersion modeling, as allowed by that rule, because the agency understood that monitors provide a more accurate indicator of ambient air quality than models.²⁰ This monitor, the “Port Arthur West 7th Street Gate” monitor, was sited by TCEQ to ensure that there is no violation of the SO₂ NAAQS near the Oxbow plant.²¹ Based on the data from that monitor, and other regulatory monitors in the Port Arthur community, EPA designated Jefferson County as attainment/unclassifiable for the SO₂ NAAQS on March 26, 2021.²² TCEQ’s robust network of air monitors—including those in the community as well as the source-specific monitor sited near Oxbow’s plant—demonstrate that the ambient air in the area is in attainment and protective of human health and the environment.

¹⁷ 84 FED. REG. 9,866 (2019).

¹⁸ 84 FED. REG. 9,866 (2019).

¹⁹ 40 C.F.R. Ch. 51, Subpart BB.

²⁰ See TCEQ Letter to EPA Texas Source Characterization Submittal (June 29, 2016), available at https://www.epa.gov/sites/default/files/2016-07/documents/texas_source_characterization.pdf (stating that ambient air quality monitoring is “the most accurate and appropriate means of determining compliance with the NAAQS”).

²¹ TCEQ 2016 Annual Monitoring Network Plan, available at <https://www.tceq.texas.gov/downloads/air-quality/sip/so2/other/2016-amnp.pdf>. However, TCEQ was forced to relocate this monitor in 2019 when the property owner revoked the underlying site usage agreement. Based on a new modeling analysis using the most recent source information from permitting files and emission inventories available in July 2019, TCEQ recommended relocating the site and received EPA approval in August 2019. The new monitor, located closer to Oxbow than the one deployed in 2017, retained the same identification number and began service in December 2019. See TCEQ 2020 Annual Air Monitoring Network Plan, available at https://www.tceq.texas.gov/downloads/air-quality/air-monitoring/network/historical/2020-amnp-portfolio.pdf/@_@download/file/2020-AMNP-Portfolio.pdf.

²² 86 FED. REG. 16,055 (2021) (Attainment/unclassifiable means that the area is meeting the standard and not contributing to a violation of the standard).

As noted by the RTC and in Table 1 below, the air has maintained compliance since the attainment designation in 2021. A map showing the location of the three Port Arthur SO₂ monitors is provided as Exhibit A. The Southeast Texas Regional Planning Commission (“SETRPC”) community monitor provides reliable monitoring of air quality in Port Arthur where Mr. Beard resides.²³ As shown in Table 1, all three monitors demonstrate compliance with the SO₂ NAAQS, both in the community—including where Mr. Beard resides—and at the monitor sited to focus more closely on Oxbow’s impact on ambient air.

Table 1: Port Arthur SO₂ Monitoring Data (2020-2022)

Year	SO ₂ (ppb) ²⁴						Primary NAAQS for SO ₂ (3-Yr Avg)
	Port Arthur West		Port Arthur West 7th Street		SETRPC Port Arthur		
	99 th Percentile	Design Value (3-Yr Avg)	99 th Percentile	Design Value (3-Yr Avg)	99 th Percentile	Design Value (3-Yr Avg)	
2020	47	44	7	32	15	16	75
2021	59	48	14	16	16	15	75
2022	56	54	23	15	13	14	75

Despite the robust data unequivocally demonstrating otherwise, the Commenters cite to an air dispersion modeling exercise to suggest SO₂ NAAQS violations may occur due to Oxbow’s emissions in support of its standing claim.²⁵ As noted by the Executive Director in the RTC, PA-

²³ See Exhibit A, SO₂ Air Monitoring Map for Port Arthur, Texas.

²⁴All SO₂ monitoring data was collected through the TCEQ’s ambient air network website. https://www.tceq.texas.gov/cgi-bin/compliance/monops/site_info.pl. Values are presented in parts per billion. 2020, 2021, and 2022 design values at AQS ID 48-245-0011 and 48-245-1071 were validated with EPA’s SO₂ design value summary workbook.

https://www.epa.gov/system/files/documents/2022-05/SO2_DesignValues_2019_2021_FINAL_05_25_22.xlsx. Substitution of the AQS 48-245-1071 2020 Q4 data was performed following the methodology of 40 C.F.R. 50 Appendix T https://www.law.cornell.edu/cfr/text/40/appendix-T_to_part_50.

²⁵ PA-CAN and Sierra Club’s comments repeat many of the same arguments alleged in PA-CAN’s Title VI complaint, attached to its Hearing Request as Exhibit 2. PA-CAN’s Title VI Complaint is wholly irrelevant to the Commenters’ hearing request. As the ED noted in the RTC, “air permits evaluated by TCEQ are reviewed without reference to the socioeconomic or racial status of the surrounding community.” RTC at 7. In any event, TCEQ submitted a Response to PA-CAN’s Title VI Complaint (EPA File No. 025-21-R6) on December 15, 2021, arguing that the complaint should not be accepted by EPA because among other reasons, “TCEQ cannot rationally be held responsible for disparities it did not create. These factors, all with potential to impact health, fall outside the purview and control of TCEQ in determining a permit renewal application under the Title V program.” On October 20, 2023, TCEQ notified EPA of

CAN's third-party modeling cannot be validated, is not consistent with TCEQ and EPA guidance, and fails to consider modeled refinements such as site-specific meteorology. The modeling offered by PA-CAN, which is shown to be invalid when compared to actual monitored levels, is simply not a reliable indicator of the air quality near Oxbow's plant nor that in the community and should be disregarded.

Just as TCEQ told EPA in 2016,²⁶ the best way to assess the quality of ambient air in through use of properly sited and operated air monitors. This has been done to ensure TCEQ has the most accurate data that both regulated entities like Oxbow and the community can rely on the determine and ensure compliance with the SO₂ NAAQS.

The request must be denied because there is no right to a contested case hearing on a "no-increase" renewal application under Texas Law. Oxbow's "satisfactory" compliance history and its full resolution of its 2019 Agreed Order leaves no exception to this rule under the TCAA or TCEQ's rules. Even if there was an opportunity to seek a contested case hearing in this matter, the Commenters cannot establish that its member, Mr. Beard, is an "affected person," to confer associational standing because verified TCEQ air monitoring data demonstrates that the ambient air in the Port Arthur community is protective of human health and the environment, even for the most sensitive sub-groups of the population.

III. CONCLUSION AND PRAYER

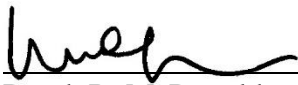
Oxbow respectfully urges the Commission to deny the hearing request, adopt the Executive Director's RTC, approve Oxbow's renewal application that is the subject of this proceeding, and

its withdrawal from the informal resolution agreement ("IRA") for Complaint Nos. 02R-21-R6, 05RNO-22-R6, and 06RNO-22-R6 because PA-CAN "failed to state a violation of civil rights law that EPA can enforce."

²⁶ See *infra*, fn. 21.

renew Permit No. 45622. There is no right to a contested case hearing on Oxbow's renewal application because it will not result in an increase in allowable emissions or the emission of an air contaminant not previously emitted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Oxbow Calcining LLC's Response to Request for Contested Case Hearing has been e-filed and served on the following counsel/persons by regular and/or electronic mail on this 30th day of October 2023.

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Exhibit A

Exhibit A

