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CHIEF CLERKS OFFICE

TCEQ DOCKET NO. 2006-1728-IWD

IN THE MATTER OF THE	§	BEFORE THE
APPLICATION OF CHEVRON	§	TEXAS COMMISSION ON
PHILLIPS CHEMICAL COMPANY LP,	§	ENVIRONMENTAL QUALITY
ORANGE PLANT FOR AMENDMENT	§	
OF TPDES PERMIT NO. WQ0000359000	§	

**APPLICANT'S RESPONSE TO PROTESTANTS' REQUEST
FOR CONTESTED CASE HEARING**

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

COMES NOW, Chevron Phillips Chemical Company LP, Orange Plant ("Applicant" or "Orange Plant") and files this Response to Friends of the Earth's ("Protestant" or "FOTE") Request for Contested Case Hearing in the above-referenced matter and requests that Protestant's Request be denied and would respectfully show the following:

I. INTRODUCTION

On August 26, 2005, Applicant applied to the Texas Commission on Environmental Quality ("TCEQ") for a major amendment to its existing Texas Pollutant Discharge Elimination System ("TPDES") Permit No. WQ0000359000. The TCEQ received the application on August 29, 2005, and declared it administratively complete on September 12, 2005. Notice of Receipt of Application and Intent to Obtain Permit was published on January 24, 2006, in the *Orange Leader*. The TCEQ Executive Director completed the technical review of the application on March 22, 2006, and prepared a draft permit. Notice of Application and Preliminary Decision was published in the *Orange Leader* on May 22, 2006, triggering the 30-day public comment period. FOTE timely submitted comments on June 20, 2006. The 30-day comment period closed June 21, 2006, and the TCEQ Office of the Chief Clerk mailed the Executive Director's

Response to Final Comment on August 23, 2006. FOTE then filed a timely Request for a Contested Case Hearing on September 22, 2006 (the "Request").

II. REQUIREMENTS OF APPLICABLE LAW

Under applicable statutory and regulatory requirements, a person or entity requesting a hearing must file the request in writing with the chief clerk no later than 30 days after the chief clerk's transmittal of the Executive Director's response to comments. *See* 30 Texas Administrative Code ("TAC") § 55.201(a), (c). The request must:

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
 - (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 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 executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
 - (5) provide any other information specified in the public notice of application.
- 30 TAC § 55.201(d).

Under 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." Additionally, 30 TAC § 55.205 (a) states that a group or association may request a contested case hearing only if they meet 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. [*Emphasis Added.*]

Since an individual within the group or association requesting a contested case hearing must have standing, the six, non-exclusive factors set forth in 30 TAC §55.203 which determine whether a person is affected are relevant in assessing the standing of a group as a whole. These 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; and
 - (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.
- 30 TAC § 55.203(c).

The Commission will grant an affected person's (or group's) timely hearing request if:

- (1) the request is made pursuant to a right to a hearing authorized by law; and (2) the request raises disputed issues of fact that were raised during the comment period and that are relevant and material to the Commission's decision on the application. 30 TAC § 55.211(c).

Responses to hearing requests must, under 30 TAC § 55.209(e), specifically address:

- (1) whether the Requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether these issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter to the chief clerk prior to the filing of the Executive Director's Response to Comment;

- (6) whether the issues are relevant and material to the decision on the application; and
- (7) a maximum expected duration for the contested case hearing.

III. DISCUSSION

A. FOTE Does Not Have Standing to Request a Contested Case Hearing.

The Protestant asserts that it has standing because: (1) a U.S. District Court found it had standing in a separate, unrelated, suit; (2) its members use the waters affected by the discharge from the Orange Plant; (3) its members' "injuries-in-fact" are not common to the general public; and, (4) it meets all other requirements for a request by a group found in 30 TAC §55.205. *See* the Request, pp. 2 – 4. The Applicant will address each of these claims in turn.

First, the Protestant would have the Commission believe an analysis of the federal law governing citizens' suits under the Clean Water Act ("CWA") is the same as that governing this administrative action. The Protestant is wrong – the law governing who an "affected person" is for purposes of this administrative proceeding is substantially different from the federal law applied in FOTE's CWA citizen suit filed in federal court. The U.S. District Court for the Eastern District of Texas, in reciting controlling law for citizens' suits under CWA, stated that the threshold for finding standing "is fairly low" and that the injuries that the plaintiffs (FOTE's members) had to allege only need be "an identifiable trifle." *See* Findings of Fact and Conclusions of Law, page 4, attached to the Request.

However, the controlling law for establishing an "affected person" in this administrative proceeding requires a series of more stringent requirements to be met. *See* 30 TAC §§ 55.203(c) and 55.205(a). First, Protestant must show that its interest claimed is one protected by the law under which the application will be considered. No such showing was made. The law under which the application is considered does not protect any alleged interests of FOTE or its members. Next, there are distance restrictions and other limitations imposed by law on the

affected interest. While the Protestant discusses the Orange Plant's distance from Sabine Lake (4 miles), it does not make any showing of any of its members' proximity to Sabine Lake. Without showing that its individual members are proximate to the "affected" source (the discharge location), Protestant can not satisfy this requirement. Further, the Protestant must prove that a reasonable relationship exists between its interest claimed and the activity regulated. Again, because of Protestant's singular reliance on a Court's findings in an unrelated CWA proceeding, it has failed to show the reasonable relationship that it has to the permitted activity. Finally, the Protestant is required to show the likely adverse impact of the regulated activity on the health and safety, use of property, and impacted natural resource of the person affected by the proposed permit. There has been no showing that the safety of any FOTE member is jeopardized by the Applicant's activities. Nor has there been any showing that any FOTE members have property or natural resources that will be affected if the permit is issued.

Second, while the Protestant states that its members have injuries-in-fact not common to the general public, they offer no support for that allegation. It once again relies on the CWA standing finding of the District Court which Applicant has previously noted had only a "trifle" threshold to show some injury (i.e., a member's aesthetic interest was impacted when she saw the lake). *See Findings of Fact and Conclusions of Law, page 4, attached to the Request.* This Commission could not process all the requests it would get if the threshold for standing was a person's aesthetic interest in the water he or she passed by. In addition to failing to show an actual injury-in-fact, Protestant fails to show that its members' interests are any different than those of the general public. There is nothing that differentiates any interests of the Protestant's members from any other resident in Southeast Texas. Thus, Protestant fails in supporting this claim as well.

Third and last, since the Protestant has failed the first prong of the association standing test (a showing that one or more members of the group or association would otherwise have standing to request a hearing in their own right as an affected person), there is no need for the Commission to even evaluate the other two prongs of the test set out in 30 TAC §55.205(a). Since none of the Protestant's members satisfy the multiple requirements of an affected person, its Request must be denied.

B. Issues Raised in the Hearing Request.

Despite the Applicant's position that Protestant's does not have standing to raise issues before the Commission, Protestant will briefly address the issues raised by the Request below.

1. The Exception to the Anti-Backsliding Rule.

First and foremost, the Protestant states that its four issues with the Executive Director's interpretation of the anti-backsliding exception are "disputed issues of law." See the Request, p. 5. According to 30 TAC §55.211(b), the Protestant is only entitled to a contested case hearing referral to SOAH if it raises a disputed issue of fact that is relevant and material to the Commission's decision: "the commission will grant an affected person's timely hearing request if..... the request raises **disputed issues of fact.**" 30 TAC §55.211(b)(3)(A). Otherwise, if the request raises issues of law or policy, then the Commission is to make decisions on the issues and act on the application – not refer the matter to SOAH for a hearing. 30 TAC §55.211(b)(3)(B).

In addition to the Protestant's inability to obtain a contested case hearing through these supposed disputed issues of law, it still fails to make a legitimate legal claim that the anti-backsliding provision was misapplied to the Applicant's change in total suspended solids ("TSS") limits. The Protestant asserts that the Executive Director did not address the issue that

the anti-backsliding exception does not apply in cases of inadequate facilities. *See* the Request, pp. 5-6. The Executive Director specifically addressed the Protestant's comments in response to Comment 1. *See* the Executive Director's Response to Comments, p. 2. Additionally, the Protestant alleges that the Orange Plant has inadequate facilities and did not follow rudimentary best practices, and thus the anti-backsliding exception in instances of an operation's material and substantial change does not apply. *See* the Request, pp. 5-6. However, the Protestant offers no support for these factual, not legal, assertions that would show the exception does not apply.

After the TCEQ's review of the Orange Plant's compliance record, it found only one instance of non-compliance with the TSS limit and thereby determined the Applicant "demonstrates general compliance with the specified limitations for TSS on a year round basis." *See* the Executive Director's Response to Comments, p. 2. The Executive Director explains, at length, the reason for the applicability of the anti-backsliding exception, and the Response as well as the Applicant's Permit Amendment provide details about the material and substantial changes that have occurred at the Orange Plant that warrant the change in TSS. Further, Protestant offers no legal precedent for the assertion that the condition of a facility or application of best management practices revokes the anti-backsliding exception.

Next, the Protestant's assertion that the limit was randomly selected based on "judgment" is false. In fact, the entire "best professional judgment" argument is a red herring. First, the Protestant mischaracterizes what best professional judgment (BPJ) is and then provides a wrong citation for the erroneous allegation that the backsliding rule prohibits use of BPJ. *See* the Request, p. 7. The citation offered by FOTE, 40 CFR §122.44(1)(2), is the anti-backsliding rule and it provides as follows:

(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) of the CWA, a permit may not be renewed, reissued, or modified on

the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.

(i) Exceptions—A permit with respect to which paragraph (1)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if—

(A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation.

This provision just sets forth the conditions for the anti-backsliding rule as well as the exception, but it makes no mention of removing a BPJ limit from qualifying for the exception. There is substantial precedent, in the Clean Water Act, in the Code of Federal Register, and in all state-delegated NPDES permitting programs for the use, and mandate, of best professional judgment. *See e.g.*, 33 USCS §1342 (a)(1); 40 CFR §125.3(c). Further, as stated by applicable statutes and regulations as well as the EPA and state environmental agencies around the country, in the absence of federal effluent limitation guidelines (which there is here), technology-based effluent limitations are based on best professional judgment calculations. *See e.g.*, Fact Sheet and Executive Director's Preliminary Decision, p. 6; U.S. EPA's NPDES Permit Writer's Course: Module 5D: Best Professional Judgment; 40 CFR §125.3(c). These analyses take into account the receiving water bodies, the process employed, control techniques, the nature of the flow and non-water quality environmental impacts. *See Leonard A. Miller et al*, NPDES Permit Handbook 3 (2nd Ed.). It is a rigorous and thorough process that is undertaken with nearly all NPDES permits that are issued. To discount BPJ out of hand and to read those limits out of the anti-backsliding exception would set dangerous new precedent for all future permit amendments.

Finally, the primary reason for application of the anti-backsliding exception in this permit amendment is that the proportion and character of the storm water changed due to material and significant operational changes at the Orange Plant. *See the Executive Director's Response to*

Comments, p. 3. The change in the proportion of the storm water and the nature of the operations of the Orange Plant are uncontested. The Protestant spends pages of its Request analyzing the concrete surfaces within the Orange Plant, *see* the Request at p. 6, how the rice gate will be used, *see* the Request at p. 7, and what the removal of the boiler house means to storm water, *see* the Request at p. 8. All these operational issues are discussed at length to distract the TCEQ from the real issue at hand: Does the Orange Plant's permit amendment TSS limit satisfy the anti-backsliding exception? The answer is very simply yes. There is not a disputed legal or factual issue that changes that answer. 40 CFR §122.44(1)(2) states that a permit can be reissued with less stringent effluent limitations if, "material and substantial alterations or additions to the permitted facility occurred after permit issuance....." As discussed by the Executive Director, the existing permit's TSS limit was based on the fact that storm water was from process areas with categorical guidelines of 130 mg/l for these types of process wastewaters. *See* the Executive Director's Response to Comments, p. 3. However, after the removal of multiple process units, the source of the storm water is more consistent with that associated with industrial activity which has a limit of 200 mg/l in the TPDES Multi-Sector General Permit. *See* the Executive Director's Response to Comments, p. 3. These limits are set for all industry, and therefore there is no disputed issue of law for this Commission. However, if the Commission did find that this issue of applicability of the anti-backsliding exception is disputed, then Applicant requests that the Commission find that the exception applies and deny the Request as required in 30 TAC §55.211.

2. *The Applicant's Facility Operations.*

The Protestant reasserts the same issues as "disputed issues of fact" as it set out in the section of the Request on "Disputed Issues of Law." *See* Request, p. 9. The Protestant realleges

that the Orange Plant's treatment facilities are inadequate based on the claims it made in its citizen lawsuit against Applicant. *Id.* The Protestant attempts to argue that because the Executive Director says the Orange Plant has a general record of compliance and the Protestant says that it doesn't then there exists a disputed fact. This is a farfetched attempt to make uncontroverted facts disputed. There is a clear factual compliance history record for the Orange Plant. The compliance record undisputedly shows that the facility has had ONE instance of noncompliance with its TPDES permit within the five year compliance history period. *See* the Executive Director's Response to Comments, p. 2. That compliance history shows the Orange Plant's general record of compliance. An applicant must make a demonstration that it has a strong record of compliance. In this instance, that demonstration is unquestionably met for the Orange Plant.

The Protestant also tries to raise one other issue as a disputed fact – the amount of storm water runoff. The Protestant says the amount will decrease rather than increase. However, as stated in the Applicant's Response to Protestant's legal issue argument, the proportion of storm water (or amount of flow) is not what drove the change in the TSS limits, and therefore it is not material or relevant to the Commission's decision on the permit. The driving factor in the changed TSS limit is the source of the storm water. As noted above, the source of the storm water used to come predominantly from process areas. Now, due to changes at the Orange Plant, typical storm water runoff comes predominantly from areas associated with industrial activity. *See* the Executive Director's Response to Comments, p. 3.

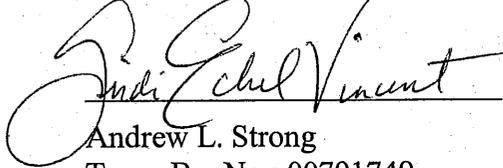
In summary, the Protestant has failed to raise any disputed issue of fact that is material and relevant to the Commission's decision on the Orange Plant's permit.

IV.

PRAYER

For these reasons, Chevron Phillips Chemical Company LP, Orange Plant respectfully requests that the Commission, in line with the prior position of the Executive Director, deny Friends of the Earth's Request for Contested Case Hearing. The Protestant has not met its burden of showing it is an affected person or group and does not raise any disputed issues of fact that are relevant and material to the Commission's decision.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Andrew L. Strong", is written over a horizontal line.

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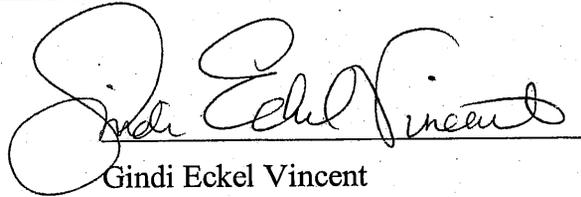
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ATTORNEYS FOR APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2007, the original and eleven true and correct copies of the Applicant's Response to Protestant's Request for Contested Case Hearing were filed with the Chief Clerk of the TCEQ via facsimile and FedEx, and a copy was served to all persons listed on the attached mailing list via facsimile transmission and/or U.S. Postal Mail.


Gindi Eckel Vincent

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