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Blas J. Coy, Jr., *Public Interest Counsel*

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

January 12, 2007

CHIEF CLERKS OFFICE

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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

**RE: CHEVRON PHILLIPS CHEMICAL COMPANY, LP
TCEQ DOCKET NO. 2006-1728-IWD**

Dear Ms. Castañuela:

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Scott A. Humphrey".

Scott A. Humphrey, Attorney
Public Interest Counsel

cc: Mailing List

Enclosure

REPLY TO: PUBLIC INTEREST COUNSEL, MC 103 • P.O. BOX 13087 • AUSTIN, TEXAS 78711-3087 • 512/239-6363

P.O. Box 13087 • Austin, Texas 78711-3087 • 512/239-1000 • Internet address: www.tceq.state.tx.us

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TCEQ DOCKET NO. 2006-1728-IWD

**IN THE MATTER OF THE
APPLICATION OF CHEVRON
PHILLIPS CHEMICAL COMPANY
FOR A MAJOR AMENDMENT TO
TPDES PERMIT NO. WQ0000359000**

§
§
§
§

**BEFORE THE TEXAS
COMMISSION ON
ENVIRONMENTAL
QUALITY**

CHIEF CLERKS OFFICE

2007 JAN 12 PM 4:17

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

**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) of the Texas Commission on Environmental Quality (the Commission or TCEQ) files this Response to Request for Hearing in the above-referenced matter.

I. INTRODUCTION

Chevron Phillips Chemical Company LP (Applicant) has applied for a major amendment to its Texas Pollutant Discharge Elimination System (TPDES) permit, which would authorize increasing the daily maximum effluent limitation for total suspended solids at Outfall 001 and reducing the monitoring frequencies for total copper, oil and grease, biochemical oxygen demand (5-day), and chemical oxygen demand at Outfall 001. The current permit authorizes the discharge of process wastewater, utility wastewater, storm water and domestic wastewater at a daily average flow not to exceed 3.15 million gallons per day (gpd) via Outfall 001. The effluent would be discharged to West Branch Gully then to Cow Bayou Tidal in Segment No. 0511 of the Sabine River Basin. The facility is located on the south side of Farm-to-Market Road 1006, approximately 1.7 miles east of the intersection of Farm-to-Market Road 1006 and State Highway 87, southwest of the City of Orange, Orange County, Texas.

The TCEQ received the application on August 29, 2005, and the Executive Director (ED)

declared it administratively complete on September 12, 2005. The Applicant published the Notice of Receipt of Application and Intent to Obtain Permit on January 26, 2006 in the *Orange Leader*. The ED completed the technical review of the application and published Notice of Application and Preliminary Decision on March 22, 2006 in the *Orange Leader*. The comment period ended on June 21, 2006.

In response to the notices on this application, the TCEQ received one timely hearing request from Friends of the Earth (FOTE). OPIC recommends the Commission deny the hearing request submitted by FOTE.

II. REQUIREMENTS OF APPLICABLE LAW

This application was declared administratively complete on September 12, 2005. Because the application was declared administratively complete after September 1, 1999, it is subject to the requirements of Texas Water Code Chapter 5, Subchapter M, Environmental Permitting Procedures, §§ 5.551 to 5.556, added by Acts 1999, 76th Leg., ch 1350 (commonly known as House Bill 801). Under the applicable statutory and regulatory requirements, a person 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. 30 TEX. ADMIN. CODE (TAC) § 55.201(c). The request must also substantially comply with the following: give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request; identify the requestor's personal justiciable interest affected by the application showing why the requestor is an "affected person" who may be adversely affected by the proposed facility of activity in a manner not common to members of the general public; request a contested case hearing; list all relevant and material disputed issues of fact that were raised during the

comment period that are the basis of the hearing request; and provide any other information specified in the public notice of application. 30 TAC § 55.201(d).

Under 30 TAC § 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.”

This justiciable interest does not include an interest common to the general public. 30 TAC § 55.203(c) also provides relevant factors that will be considered in determining whether a person is affected. These factors include:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;
- (2) distance restriction 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, safety, and 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.

The Commission shall grant an affected person’s timely filed hearing request if: (1) the request is made pursuant to a right to 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).

Accordingly, pursuant to 30 TAC § 55.209(e), responses to hearing requests must 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 the 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 with 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. Affected Person Status

FOTE is an organization requesting a contested case in this matter. In its hearing request, FOTE makes several references to an attached 2004 federal case from the Eastern District of Texas (the federal case).¹ FOTE is a non-profit corporation organized under the laws of the District of Columbia to promote a broad agenda of environmental awareness and improvement projects.² FOTE implements this agenda by filing lawsuits such as the federal case and, presumably, requesting contested case hearings such as the matter at hand.³

Under 30 TAC § 55.205(a), a group or association such as FOTE 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. FOTE notes that in the federal case, the district judge concluded that FOTE had standing as an association in that case. Therefore, FOTE concludes that since it had standing in the federal case, it must also have standing to request a

¹ Enclosure 1, identified as *Friends of the Earth v. Chevron Chemical Co.*, 1:94-cv-434

² *FOTE v. Chevron*, p. 1

³ *Id.*

contested case hearing in this matter with the TCEQ.⁴ OPIC agrees that the federal case made that finding, and its findings may be persuasive in this case. However, before OPIC can agree that the content of the federal case's reasoning provides a sufficient basis to prove that FOTE is an affected person in this case, OPIC must review the federal court's legal reasoning and apply it to the facts in this case.

In the federal case, the judge identified the standard for association status: (1) the organization's members would have standing to sue individually; (2) the organization is seeking to protect interests that are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the organization's members to participate in the lawsuit.⁵ The standards in the federal case are virtually identical to the TCEQ rules for group or association status. The only remaining legal issue is to compare the federal standing rules to the TCEQ "affected person" requirements described *supra*.

In the federal case, a member must meet three standing requirements. Specifically, he must show that: (1) he has suffered an actual or threatened injury as a result of the actions of the defendant; (2) the injury is "fairly traceable" to the defendant's actions; and (3) the injury will likely be redressed if he prevails in his lawsuit.⁶ The standing rules in the federal are not the same as the affected person requirements the TCEQ uses to determine if a person is entitled to a contested case hearing. Therefore, OPIC cannot agree that FOTE is automatically entitled to a contested case hearing in this matter simply because FOTE was found to have standing in the

⁴ See FOTE's contested case hearing request, pgs. 2-3

⁵ *FOTE v. Chevron*, p. 4

⁶ *Id.*

federal case.

As a result, FOTE must demonstrate it is an affected person based on the content of its hearing request. FOTE has identified four members: Delaine Sweat, who has previously walked, driven along and fished along Sabine Lake, but stopped doing so because the water appeared polluted; Margaret Green, who fished and boated in Sabine Lake but no longer does so routinely because of its reduced aesthetic beauty; Opal Fruge, who no longer boats and fishes because of the water's appearance and condition; and Rodney Crowl, who stopped visiting Sabine Pass because he was concerned about the condition of the fish caught in Sabine Lake.

Based on the information provided, OPIC cannot conclude that any one of these members is an affected person. Without any information regarding where the members have recreated relative to the discharge point or where they live with respect to the facility or discharge route, OPIC is unable to determine whether they have interests not common to the general public.⁷ OPIC is also unable to correlate their interests with the regulated activity to determine if they have a justiciable interest. If FOTE can provide further information, OPIC will reconsider its recommendation.

B. Issues Presented

OPIC recommends the Commission deny the hearing request. However, should the Commission choose to grant FOTE's request, OPIC would present the following issues of fact to be referred to a contested case hearing:

⁷OPIC notes that in prior proceedings concerning issues of standing based on recreational use, persons have been found to be affected persons when they both recreated and owned or leased property in close proximity to the proposed discharge. *Eastman Chemical*, TNRCC Docket No. 1997-1058-IWD; *Dos Republicas Resource Co.*, TNRCC Docket No. 1994-0446-IWD

1. Are the treatment facilities and procedures adequate?

In its first comment, FOTE raised the factual issue of the adequacy of the Applicant's treatment facilities. Comment 2 states the Applicant's maintenance of its Cube Pond treatment facility is inadequate because it has allowed solids to accumulate in the pond, and these solids are scoured out during heavy rainfall and contribute to Total Suspended Solids (TSS) discharges. Comment 6 states that the Applicant has failed to institute adequate control measures to stabilize materials that would contribute solids to the discharge during a storm event. FOTE also states that the Applicant's failure to institute adequate control measure constitutes a failure to follow rudimentary best management practices.

The ED responds that the historical record tends to indicate that the treatment facilities have a record that demonstrates general compliance with the specified limitations for TSS on a year-round basis. The ED does not expect the Applicant's program of removing sediments from the Cube Pond to result in any significant change in the quality of the effluent with respect to TSS or the Applicant's ability to treat TSS.

2. Are the proposed TSS limitations appropriate and accurate?

FOTE asserts the change at the facility that was the basis of justification for the modification of the daily maximum limitation for TSS should actually result in a decrease of the TSS loading from storm water resources. FOTE states that the reduction in the process wastewater flow will cause an increase in the available capacity of the wastewater treatment plant to treat more storm water than previously treated, justifying more stringent limitations for TSS.

The ED replies that the daily maximum limit for TSS was increased because of the changes made to the facility affecting the character of the storm water. Differences in the

proportions of contributing source flows between the existing permit and the proposed permit had a minimal influence on the final calculated daily maximum limitation for TSS. The concentration limit allocation change had the most influence on the final calculated daily maximum limitation for TSS.

C. Maximum Duration of Hearing

Section 50.115(d) of the TCEQ's rules requires the Commission to specify the maximum expected duration of the hearing in its order when referring a matter to the State Office of Administrative Hearings. The rules specify that the Commission must state the duration of the hearing from the preliminary hearing to the Administrative Law Judge's issuance of the Proposal for Decision (PFD). OPIC estimates that the maximum expected duration of a hearing on this matter would be eight (8) months from the date of the preliminary hearing until the issuance of the PFD.

IV. CONCLUSION

OPIC recommends denying the hearing request submitted by FOTE. OPIC will reconsider its determination based on any additional information in a timely filed reply concerning the location of FOTE members' interests relative to the Applicant's discharge point. Should the Commission grant the hearing request, OPIC recommends referring the above-referenced issues to SOAH with a maximum duration of eight months for the hearing.

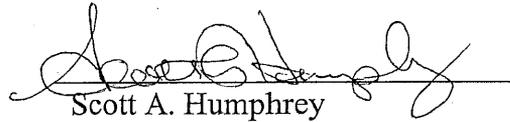
Respectfully submitted,

Blas J. Coy, Jr.
Public Interest Counsel

By 
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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2007 the original and eleven true and correct copies of the Office of the Public Counsel's Response to Request for Hearing were filed with the Chief Clerk of the TCEQ and a copy was served to all persons listed on the attached mailing list via facsimile transmission, and Inter-Agency Mail or by deposit in the U.S. Mail.


Scott A. Humphrey

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