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January 29, 2007

VIA FACSIMILE AND FEDEX

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TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY
2007 JAN 29 PM 2:40
CHIEF CLERKS OFFICE

Re: Chevron Phillips Chemical Company, LP
TCEQ Docket No. 2006-1728-IWD

Dear Ms. Castañuela:

Enclosed for filing in the above-referenced matter are the original and 11 copies of Requester Friends of the Earth's Reply. Thank you for your assistance.

Sincerely,



Carolyn Smith Pravlik
Counsel for Friends of the Earth

cc: Mailing List

P. 003/013
2007 JAN 29 PM 2:40
CHIEF CLERKS OFFICE
TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

TCEQ DOCKET NO. 2006-1728-11

IN THE MATTER OF THE APPLICATION OF)
CHEVRON PHILLIPS CHEMICAL COMPANY) BEFO:
FOR A MAJOR AMENDMENT TO TPDES) COMM
PERMIT NO. WQ0000359000) ENVIR

ORZ G.

REQUESTER FRIENDS OF THE EARTH'S REPLY

Friends of the Earth (FOE) files this reply to the responses of the Office of Public Interest Counsel (OPIC), the Executive Director, and Chevron Phillips Chemical Company LP (CPCC).

FOE is an environmental organization dedicated among other things to enforcing the requirements of the Clean Water Act, 33 U.S.C. 1251, *et seq.* To that end, FOE has filed numerous citizen suits under 33 U.S.C. 1365, on behalf of its members to enforce NPDES permits. *See, e.g., Friends of the Earth v. Laidlaw Environmental Services, Inc., (TOC), 528 U.S. 167 (2000); Friends of the Earth v. Chevron Chemical Co., E.D. Tex, Civ. Nos. 1:94CV434, 1:94CV580.* All too frequently during the course of an action to enforce an NPDES permit, the permittee seeks to have its permit relaxed in order to avoid having to comply. This is exactly what CPCC did here.

In 1994, FOE sued Chevron Chemical Company, the predecessor to Chevron Phillips Chemical Company, to enforce the total suspended solids (TSS) limitations in its permit and that lawsuit continues today. *Friends of the Earth v. Chevron Chemical Co., E.D. Tex., Civ. Nos. 1:94CV434, 1:94CV580.* Chevron admits, as was proven during the course of the litigation, that Chevron was unable to comply with its TSS limitation during storm events. Otherwise, it was generally able to comply with its TSS limitations.

The federal court found that Chevron informed both state and federal agencies that it had designed its upgraded wastewater treatment plant (WTP) to handle a 5-year, 24-hour storm event and that the upgraded WTP, as constructed in November 1994, was able to meet the 5-year, 24-hour

storm.^{1/} Findings of Fact and Conclusions of Law, p.14.^{2/} However, the Court found that, in fact, the upgraded WTP is improperly designed and is unable to meet the TSS limits during storms less significant than the 5-year, 24-hour storm. *Id.*, p. 16.

In August 2001, CPCC was granted a change in its TSS limitation. The limitation was changed from a load limit to a concentration limit. This change had the effect of relaxing the TSS limitation.

In September 2002, CPCC violated the new limitation during a storm event of 4.8 inches. It informed TCEQ that the violation was due to an accumulation of solids in the Cube Pond segment of its treatment facilities. Letter from CPCC to TCEQ, dated October 17, 2002.^{3/} CPCC explained that the solids were scoured out of the Cube Pond during the storm and caused an excessive amount of TSS in its discharge. CPCC later determined that the violation would be remedied by CPCC's instituting a regime of regular solids removal from the Cube Pond. However, based on this violation, CPCC sought another relaxation of its TSS limitations, which was granted for the daily maximum TSS limitation by the Executive Director.

After instituting its solids removal regime, CPCC sampled its discharge during a storm on June 19, 2006, that produced approximately 7.2 inches of rainfall. The resulting TSS measurement was only 45 mg/l of TSS. The significance of the rainfall is that it was almost equivalent to the 7.3 inches of rain produced by a 5-year, 24-hour storm event, the event for which CPCC represented to

^{1/}A 5-year, 24-hour storm in Orange, Texas, involves a rainfall of at least 7.3 inches. See Findings and Conclusions, p. 14.

^{2/}The federal court's Findings of Fact and Conclusions of Law were attached as Exhibit 1 to FOE's hearing request.

^{3/}This letter was attached to FOE's comments as Enclosure 2.

the Commission, EPA, and the federal district court that its treatment facilities were designed. Moreover, the resulting TSS was well below the more stringent TSS limitation of 127 mg/l that CPCC seeks to have relaxed.

Following notice of the Executive Director's decision to relax the TSS limitation, FOE filed a timely request for a hearing. FOE challenges the relaxation of CPCC's TSS limitation as an impermissible backsliding of the limitation in violation of 40 C.F.R. 122.44(l).

In each of their responses to FOE's request for a contested case hearing, OPIC, the Executive Director, and CPCC contend that FOE's request for a hearing should be denied, not because it lacks merit, but because FOE lacks standing to contest the violation of the regulations. They do so in spite of the fact that the federal district court found that FOE on behalf of its members had standing to enforce CPCC's permit. This is the typical diversion that agencies and permitholders utilize in order to deflect attention from their violation of the Clean Water Act when citizen's attempt to challenge the violation. As a result, backsliding and other violations of the Clean Water Act are routinely sanctioned or ignored because citizens do not have the resources to pursue cases that focus on procedural issues rather than on the unlawful conduct. Consequently, not only is the Clean Water Act violated and its long-overdue goal of zero-discharge further delayed, but the very important citizen participation requirement of the Clean Water Act is effectively nullified.

In addition to the materials previously provided regarding FOE's standing, FOE is providing the testimony provided by its members in the federal court case that underlies the court's findings with regard to FOE's standing and the summary of the testimony as presented in FOE's proposed findings of fact to the federal court. It is clear from all of these materials and those previously submitted that FOE's members are affected persons with an interest in the waterways affected by

CPCC's discharges. Their interest in the quality of the receiving waters may not be unique as to all other persons, but it is not an interest held by the general public. Furthermore, they have a strong, unique interest in protecting the relief that they stand to be awarded by the federal district court due to its finding that CPCC is liable for violating its permit. Obviously, the relief will be more significant the more stringent CPCC's TSS limitation is. When the federal district court has found that FOE and its members are adversely affected by CPCC's TSS discharge and have standing to enforce the TSS permit limitations due to their interests in the receiving waters affected by CPCC's TSS discharge, it would be illogical for this Commission to deny FOE the opportunity to challenge the Executive Director's decision to relax that very same TSS limitation.

The Executive Director's Response to Hearing Request (hereafter "ED Response") identified a number of issues that should be considered in the contested case in the event that a hearing was not denied on standing grounds. FOE agrees that these issues should be considered. On the other hand, the Executive Director identified a number of issue that should not be approved for a hearing. FOE responds with regard to each of these issues below using the issue number system utilized by the Executive Director. To the extent that an issue is a legal one, FOE urges the Commission to decide the issue in its favor for the reasons set forth in its comments, its request for a contest case hearing, and the discussion below.

Issue #3: "Whether the anti-backsliding exception can be used when an applicant's treatment facilities are inadequate"

40 C.F.R. 122.44(1) prohibits the issuance of an NPDES permit with an effluent limitation that is less stringent than the effluent limitation in the prior permit, except under very limited circumstances. Backsliding cannot be justified under 40 C.F.R. 122.44(1) where the applicant's

treatment facilities have been adjudged to be inadequate, as is the case here.

The Executive Director recommends that Issue 3 not be referred because it "raises a question of law or policy." ED Response, Issue #3.

FOE agrees that Issue #3 is an issue of law or policy. However, FOE does not agree that the issue is inapplicable to this case as the Executive Director claims. The adequacy of treatment facilities is relevant to every request for relaxation of a permit limit under 40 C.F.R. 122.44(l). Otherwise, it would be impossible to assess whether any claimed "material and substantial alterations" to the facility justified a more lenient limitation when a properly designed and operated treatment facility may be able to satisfy the permit limitation regardless of the claimed "material and substantial alterations."

Presumably, the Executive Director is relying on 40 C.F.R. 122.44(l)(2)(E) and 40 C.F.R. 122.62(a)(16), when he states without citation or rationale that the adequacy of treatment facilities is only an issue in one exception to backsliding that is not applicable here. *See* ED Response, Issue #3. These provisions do not support the Executive Director's position. Instead, they merely provide, in different contexts, that, if there is no other basis for backsliding, backsliding is permissible if the permittee has installed and operated proper treatment facilities and is still unable to meet the imposed permit limitation. These provisions cannot be read to support the Executive Director's claim that backsliding is permissible under the other exceptions regardless of the adequacy of the treatment facilities.

Both the Executive Director and CPCC acknowledge the need to examine the compliance history of the facility for purposes of determining whether backsliding is justified. ED, Response to Comment 1; CPCC Response, p. 11 ("An applicant must make a demonstration that it has a strong

record of compliance"). Indeed, 30 TAC § 60.1(a) compels the consideration of compliance history in amending or modifying permits. CPCC does not have a strong record of compliance during significant rainfall events. CPCC admits in its application for a permit amendment that it "has had continuing difficulty complying with the daily maximum TSS limits because of the large amount of storm water runoff that is periodically discharged from Outfall 001." Permit Application, Attachment 1 ("Permit Amendments"). CPCC's compliance record during significant rainfall events shows repeated violations. *See Findings of Fact*, p. 18. The fact that the number of violations is not significantly higher is due to the fact that significant rainfall events and monitoring days do not often coincide.

Since CPCC violates its TSS limitation during significant rainfall events and the federal court has determined that the cause of such violations is the inadequacy of CPCC's treatment facilities (*Findings of Fact*, pp. 14, 16), CPCC cannot demonstrate and the Commission and Executive Director cannot find that CPCC has a strong compliance record in storm events that will be jeopardized by the "material alterations" to the facility and thus justify relaxation of the TSS limitation.

The Commission should therefore decide that CPCC's inadequate treatment facilities create a compliance history that does not justify backsliding. Alternatively, the Commission should refer this issue, together with an interrelated issue, Issue #8, regarding the adequacy of CPCC's treatment facilities, to SOAH.

In the alternative, the Commission should decide that backsliding is not justified in spite of alterations to the facilities since CPCC was able to meet the permit limitation it seeks to have relaxed by a wide margin with the "material alterations" to its facility. As discussed above, in June 2006,

well after the alterations to its facility, CPCC sampled its discharge during a storm almost equivalent to the 5-year, 24-hour storm for which its treatment facilities were designed. The sample produced a TSS daily maximum value of 45 mg/l. This is well below the more stringent permit limitation of 127 mg/l. Accordingly, the alterations to CPCC's facility upon which it based its request for relaxation of the TSS limitation do not justify relaxation of the TSS limitation.

Issue #4 "Whether the anti-backsliding exception can be used when an applicant fails to follow rudimentary best management practices (BMP)"

The Executive Director states that this is an issue of law or policy that has no application here because "[t]he Applicant's ability to follow BMP's is not a factor in determining the applicability of the backsliding exceptions." ED Response, Issue #4. As with Issue #3, backsliding cannot be justified unless the permittee is taking all reasonable steps toward compliance with the more stringent limitation. Otherwise, it would be impossible to assess whether the alterations in the facility justify relaxation of the limitation.

Furthermore, as addressed above, the Commission's regulations require consideration of compliance history in making decisions regarding permit amendments or modifications such as those sought by CPCC. The regulations expressly require consideration of the operation and maintenance of the regulated facilities and sources in relationship to the discharge of pollutants. 30 TAC §60.2(a) and (c)(2)(G).

Issue #5: "Whether the changes to Applicant's facility result in an increase of TSS concentration in the storm water discharged through Outfall 001"

FOE has taken the position that in order to qualify for a backsliding exception, the changes relied upon for backsliding must make it more difficult to meet the current, more stringent permit limitation. In conjunction with that position, FOE has shown that the changes to CPCC's facility

do not make it more difficult for it to meet the current permit limitation and therefore backsliding cannot be justified. The Executive Director and FOE agree that this is an issue for hearing. CPCC claims that this is not an issue for hearing because it is undisputed that the alterations to the facility changed the ratio of the facility controlled under the OCPSF guidelines compared to the ratio controlled under BPJ; therefore, it is a purely legal issue as to whether backsliding is permissible when these proportions are altered. CPCC Response, p. 10. CPCC also argues that FOE has erroneously argued that backsliding is not permissible for BPJ limitations. *Id.*, p. 9.

A change in the proportion does not automatically permit backsliding. Under 40 C.F.R. 122.44(1)(2), the general rule is that backsliding is not permitted when the basis for regulation shifts from BPJ to effluent guideline. FOE has argued by analogy that backsliding is likewise not permissible when the shift is from effluent-guideline-based regulation to BPJ regulation. Since such a shift in the basis for regulation is not an automatic reason for backsliding, one of the exceptions must be satisfied. Accordingly, the changes or alterations at CPCC's facility, regardless of the resulting regulatory basis, must make it sufficiently more difficult for CPCC to comply with the current permit limitation so that relaxation of the limitation is justified.

FOE has shown that the changes or alterations to CPCC's facility upon which it sought amendment of the TSS limitation make it less, not more, difficult for CPCC to comply with its current TSS limitation. Therefore, regardless of regulatory basis, backsliding is not justified. Since the Executive Director appears to have allowed the backsliding on the basis of the shift in the regulatory basis alone and not on the basis that the alterations will make it sufficiently more difficult for CPCC to comply so that backsliding is justified, the Executive Director's decision violates the anti-backsliding regulations.

Issue #6 "Whether the Applicant's use of the rice gates should be considered when setting the TSS permit limits"

Two of the plant changes upon which CPCC bases its claim of "material change or alteration" relate to waters that are contained by the rice gates at the facility during storm events. The rice gates act as a storm surge tank so that all of the storm water tributary to the gates is held back from the wastewater treatment plant during storm events. The Executive Director claims that, in setting the relaxed TSS limitation, he was not required to consider the use of the rice gates. ED Response, Issue #6. He further claims that this issue does not raise an issue of fact and therefore should not be referred to SOAH. *Ibid.*

FOE agrees that this is an issue of law. However, FOE strongly disagrees that the issue is "not relevant to the Commission's decision on the application," as the Executive Director claims. The relaxed TSS limitation is based on best professional judgment (BJP). BJP requires consideration of the treatment and management practices employed at the facility. While the Executive Director is correct that the permit cannot include a requirement that the rice gates be employed, the Executive Director is incorrect in suggesting that the rice gates are "not relevant and material" to establishing a permit limit based on BJP. The consideration of treatment and other control facilities is mandatory in establishing a BJP-based effluent limit. 40 C.F.R. 125.3(d). Accordingly, the Executive Director should have considered the effect the rice gates have on the volume, quality and proportion of flow during storm events in setting a BJP-based effluent limitation.

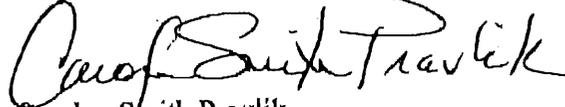
To the extent that the Commission determines that backsliding is justified under the circumstances here, the Commission should require that the rice gates be considered in setting a BJP

effluent limitation for TSS.

Issue #8: "Whether the Applicant's treatment facilities are inadequate"

The Executive Director recommends that Issue #8 not be referred to SOAH because it "is not relevant and material to the Commission's decision on the application. TCEQ sets the permit limits and it is the responsibility of the Applicant to meet those limits." As explained above in reply to Issue #3, the adequacy of the applicant's treatment facilities is integral to the issue of whether backsliding is justified.

Respectfully submitted,



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January 29, 2007

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2007, the foregoing was filed by facsimile transmission with the Office of the Chief Clerk, that the original and eleven true and correct copies of the foregoing was deposited for two-day delivery with FedEx and that a copy of the foregoing was served on all persons on the attached mailing list via first-class, postage pre-paid mail.



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